SUPREME COURT, U.S.
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No. 06-619

IN THE

Supreme Court of the United States

BACCARAT FREMONT DEVELOPERS, LLC,
Petitioner,

v.

UNITED STATES ARMY CORPS OF ENGINEERS;
LT. COL. TIMOTHY S. O'ROURKE, DISTRICT ENGINEER,
SAN FRANCISCO DISTRICT,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Is petitioner, whose action challenging a United States Army Corps of Engineers wetlands jurisdictional determination was pending when this Court issued its decision in the consolidated cases *Rapanos v. United States* and *Carabell v. United States Army Corps of Engineers*, __ U.S. __, 126 S. Ct. 2208, 165 L. Ed. 2d 159 (June 19, 2006) (collectively, "*Rapanos*"), entitled to a redetermination, conducted in accordance with the principles announced in *Rapanos*, of the existence or absence of federal jurisdiction over petitioner's wetlands?

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner Baccarat Fremont Developers, LLC ("Baccarat") hereby states that it is a California limited liability company, with no parent corporation, and that no publicly held company owns 10% or more of Baccarat's stock.

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PETITION FOR A WRIT OF CERTIORARI

Baccarat respectfully petitions this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 425 F.3d 1150 (9th Cir. 2005) ("*Baccarat*"), App. A. The opinion of the District Court was reported at 327 F.Supp.2d 1121 (N.D. Cal. 2003), App. B. The decision of the United States Army Corps of Engineers ("Corps"), South Pacific Division, on Baccarat's administrative appeal was not published, but is attached as App. C. The Corps' San Francisco District decision on administrative appeal remand, and its initial admin-

istrative decision from which the administrative appeal was taken, are attached as App. D and App. E, respectively.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on October 14, 2005. After obtaining an extension of time to December 5, 2005, to file a rehearing petition, App. F, Baccarat timely submitted a petition to the Court of Appeals for rehearing and rehearing en banc. App. G (order confirming receipt of petition on December 5, 2005). On December 22, 2005, the Court of Appeals issued an order deferring consideration of the rehearing petition pending this Court's review of the Sixth Circuit Court of Appeals' decision in *Carabell v. United States Army Corps of Engineers*, 391 F.3d 704 (6th Cir. 2004), *cert. granted*, __ U.S. __, 126 S. Ct. 415 (2005). See App. G. The Ninth Circuit subsequently denied Baccarat's rehearing petition on August 3, 2006, App. H, and denied a request for stay of mandate on August 17, 2006, App. I. This petition is timely filed pursuant to Rule 13.3 of the Rules of the Supreme Court. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS AT ISSUE

The Clean Water Act ("CWA") provides in pertinent part:

> Except as in compliance with this section and section [] . . . 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

33 U.S.C. § 1311(a) (CWA § 301(a)).

> The Secretary may issue permits, after notice and opportunity for public hearings, for the discharge of dredged or fill material into the navigable waters at specified disposal sites.

33 U.S.C § 1344(a) (CWA § 404(a)).

(7) The term "navigable waters" means the waters of the United States, including territorial seas.

33 U.S.C. § 1362(7) (CWA § 502(7)).

Federal regulations define "waters of the United States" as:

(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters, including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce, including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purpose by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under the definition;

(5) Tributaries of waters identified in (a)(1) through (4) of this section;

(6) The territorial seas;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1) through (6) of this section.

33 C.F.R. § 328.3(a) (2005).

Federal regulations define "adjacent" as:

> The term *adjacent* means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent wetlands."

33 C.F.R. § 328.3(c) (2005).

INTRODUCTION

Baccarat seeks review of the judgment below because the standard applied by the Court of Appeals for assertion by the Corps of regulatory jurisdiction over Baccarat's wetlands cannot be reconciled with principles this Court announced in *Rapanos*.[1] Because those principles must be applied in this case, certiorari should be granted and the judgment should be reversed or vacated and the matter remanded for a redetermination of federal jurisdiction in accordance with the *Rapanos* decision.

Baccarat owns a tract of land in the City of Fremont, California that contains some seasonally wet depressions ("wetlands"). The Corps claims jurisdiction to regulate these wetlands under the Clean Water Act. 33 U.S.C. §§ 1251 *et seq.* (2003) ("CWA"). The Corps determined that it had regulatory jurisdiction on the theory that the wetlands are "adjacent" to "waters of the United States." The District Court and, thereafter, the Court of Appeals, affirmed the Corps' assertion of adjacent wetlands jurisdiction. The Court of Appeals held that the Corps has jurisdiction over any

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[1] *Rapanos* involved two separate Sixth Circuit cases consolidated for review in this Court. The two cases were *United States v. Rapanos*, 376 F.3d 629 (6th Cir. 2004), *cert. granted*, __ U.S. __, 126 S. Ct. 414 (2005), and *Carabell v. United States Army Corps of Engineers*, 391 F.3d 704 (6th Cir. 2004), *cert. granted*, __ U.S. __, 126 S. Ct. 415 (2005). In this petition the Sixth Circuit's opinion in *Carabell* shall be referred to as "*Carabell I*."

wetlands that qualified under Corps regulations as "adjacent" to "navigable waters," 33 C.F.R. § 328.3(a)(7) (2005), even in the absence of a significant hydrological or ecological connection between the wetlands and the navigable waterway. In so holding, the Court of Appeals observed that the facts of this case are "remarkably similar" to the facts analyzed by the Sixth Circuit Court of Appeals in *Carabell I*. In its decision affirming the Corps' assertion of jurisdiction, the Ninth Circuit applied essentially the same broad jurisdictional standard that the Sixth Circuit applied in *Carabell I*. App. A, 11a-12a. In further recognition of the parallels between the two cases, the Ninth Circuit deferred its resolution of petitioner's rehearing request pending the outcome of this Court's review of *Carabell I*. The rule of decision established by this Court in *Carabell* was, therefore, to be the rule of decision for Baccarat.

In *Rapanos*, a divided Supreme Court vacated the Sixth Circuit's decisions in *Carabell I* and in *United States v. Rapanos*, 376 F.3d 629 (6th Cir. 2004), *cert. granted*, __ U.S. __, 126 S. Ct. 414 (2005). Five Justices rejected the basis upon which the Sixth Circuit had affirmed the Corps' assertion of wetlands jurisdiction in these cases. Both cases, *Rapanos* as well as *Carabell*, were remanded for further proceedings.

So, too, should this case be remanded for a redetermination, in light of the principles enunciated in *Rapanos*, of the existence of a basis for asserting federal jurisdiction over the Baccarat wetlands. Having deferred its ruling on Baccarat's rehearing petition pending this Court's review of *Carabell I*, the Ninth Circuit could have accomplished this necessary result by granting rehearing. Instead, without comment or indication that it had considered the petition, the Court of Appeals denied rehearing.[2] Baccarat's sole recourse, there-

[2] The Ninth Circuit's order denying rehearing was a summary denial. App. H, 51a-52a. As such, under Ninth Circuit practice, the order cannot be read to imply any views of the Court of Appeals on the merits of the

fore, lies with this Court. Baccarat urges the Court to grant certiorari and reverse or vacate the Ninth Circuit's decision and remand this case for further proceedings.

STATEMENT OF THE CASE

A. The Baccarat Wetlands.

This case arises out of the Corps' assertion of regulatory jurisdiction under the CWA over wetlands located on Baccarat's property. The Corps claims that these wetlands are "adjacent" to other waters that it may regulate under the CWA, and that they therefore qualify as jurisdictional "waters of the United States" as the Corps defined that term in its regulations at 33 C.F.R. § 328.3(a).

At issue are a combined 7.18 acres of wetlands scattered throughout Baccarat's 30.98 acre project site. App. B, 15a-16a. Two flood control channels that ultimately connect to the San Francisco Bay are located, at the closest point, approximately 65-70 feet away from the southern and western boundaries of the roughly rectangular project site. App. A, 3a.. The Alameda County Flood Control District ("ACFCD") maintains and operates these flood control channels. Two sets of berms separate the wetlands from the flood control channels. One set of man-made berms borders the southern and western project site boundaries. App. A, 2a-3a. Additionally, berms located on the adjoining flood control property owned by ACFCD separate the project site from the flood control channels, and a maintenance road sits atop these

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petition. *United States v. Cote*, 51 F.3d 178, 181 (9th Cir. 1995) ("summary denial of the petition" "does not imply any judgment on the merits" of a request in the petition where the denial "does not indicate the court considered and decided the issue . . . ."); see also *Luckey v. Miller*, 929 F.2d 618, 622 (11th Cir. 1991) ("a summary denial of rehearing en banc is insufficient to confer any implication or inference regarding the court's opinion relative to the merits of a case"), quoted in *Cote*, *supra*, 51 F.3d at 181.

flood control channel berms. App. B, 16a. It is not disputed that the ACFCD flood control channels contain waters of the United States. App. A, 7a. If the berms were removed, the wetlands would connect to the flood control channels. App. A, 3a.

B. The Administrative Decisions.

In February 1998, following a request by Baccarat for a jurisdictional determination, the Corps determined that it had CWA jurisdiction over the wetlands on the project site.[3] App. A, 3a. That same month, Baccarat submitted a permit application to fill 2.36 acres of the delineated wetlands to the Corps under Section 404 of the CWA (33 U.S.C. § 1344). *Id.* On January 29, 2001, before the Corps issued its decision on the permit application, Baccarat asked the San Francisco District of the Corps ("District") to reconsider its jurisdictional determination in light of this Court's decision earlier that month of January in *Solid Waste Agency of Northern Cook Cty. v. Army Corps of Engineers*, 531 U. S. 159 (2001) ("*SWANCC*"). *Id.* By letter dated May 8, 2001, the District reaffirmed its jurisdictional determination, claiming that the wetlands were "adjacent to a tidal flood control channel." App. E, 45a. In support of this determination, the District found that the flood control channel "is located within 250 feet of the site's western and southern boundaries." *Id.*, at 45a-46a. The District also relied upon its regulatory definition of "adjacent," which states: "Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes, and the like are 'adjacent wetlands.'" 33 C.F.R. § 328.3(c) (the "Barriers

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[3] The Corps found 7.66 acres of jurisdictional wetlands on the project site, 7.18 acres of which are contested by Baccarat. The remaining 0.48 acres of wetlands have always been conceded to be jurisdictional under the CWA because of their surface hydrological connection to tidal waters. App. B, 16a.

Regulation"). *Id.* Finally, the District noted that "the wetlands would flow into the channel in storm events, if not for the man-made barriers." *Id.*

Baccarat appealed the District's reaffirmed assertion of jurisdiction to the Corps' South Pacific Division ("Division"). App. A, 3a. In its "Administrative Appeal Decision" dated October 25, 2001, the Division remanded the jurisdictional determination to the District "to reconsider and further document and/or modify its conclusions regarding which wetlands on the project site are adjacent to jurisdictional waters of the United States." App. C, 26a. The Division found fault with the District's failure to document sufficiently why a 250-foot separation between wetlands and other waters meets the adjacency standard. The Division further found irrelevant the District's speculation regarding what might happen if the intervening barriers (the berms) were removed. Finally, the Division observed that while the intervening barriers do not necessarily extinguish adjacency jurisdiction under the Barriers Regulation, neither do they establish it. App. C, 32a-33a.

On January 28, 2002, the District decided, on remand, to reaffirm its assertion of jurisdiction over the wetlands. App. D, 37a-38a. Notwithstanding the Division's findings and instructions, the District (1) reasserted its reliance on the Barriers Regulation, (2) stated that "it is recognized in the courts that adjacency includes the concept of reasonable proximity," but failed to heed the Division's instructions that it cite any evidence in the record supporting the assertion of jurisdiction on the basis of a "reasonable proximity" standard, (3) stated a conclusion that the wetlands "contribute to the improved quality of the aquatic environment in general and the tidal waters in the immediate vicinity in particular," (4) cited a report which found that restoration of wetland habitat in the general geographic vicinity of the Baccarat wetlands—but not the project site itself—would have ecological benefits, (5) asserted that the wetlands are within the 100 year floodplain of a jurisdictional waterbody, and

(6) cited a soil survey showing that "most of the subject wetlands" share the same type of soils as those of the tidal waters in the same general area. App. D, 39a-43a.

On February 6, 2002, the Corps proffered a permit to Baccarat to fill 2.36 acres of wetlands on the project site, with the condition that the remaining 5.3 acres of wetlands be enhanced and preserved. App. A, 4a. Baccarat accepted the proffer subject to reservation of its right to seek judicial review of the Corps' jurisdictional determination. *Id.* The permit was issued on March 1, 2002. *Id.*

C. The District Court Decision.

Baccarat subsequently filed the instant action against the Corps in the United States District Court for the Northern District of California, seeking a declaration that the Corps lacked jurisdiction to regulate its wetlands. On August 11, 2003, the District Court granted the Corps' motion for summary judgment, affirming the Corps' assertion of jurisdiction, and holding that the "Corps' regulatory jurisdiction over adjacent wetlands under the Clean Water Act does not depend on the existence of an actual hydrological or ecological connection between the wetland and navigable waters." App. B, 22a. The District Court entered judgment in favor of the Corps accordingly.

D. The Ninth Circuit Opinion.

Baccarat appealed the District Court's judgment to the Ninth Circuit. On October 14, 2005, the Ninth Circuit affirmed, holding that the "Corps' jurisdiction over wetlands falling within the adjacency clause in 33 C.F.R. § 328.3(a)(7) does not depend on the existence of a significant hydrological or ecological connection between the particular wetlands at issue and waters of the United States." App. A, 11a, 13a. The Ninth Circuit found support in the Sixth Circuit's opinion in *Carabell I*, an opinion which this Court had agreed to

review three days before the filing of the Ninth Circuit's opinion below. The facts of *Carabell*, as the Ninth Circuit observed, are "remarkably similar to the facts here." App. A, 11a. In both cases, the wetlands at issue were separated from ditches or channels by man-made berms or barriers, and in both cases the courts relied upon the Corps' regulatory definition of "adjacent" wetlands, which provides, in part, that "[w]etlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent wetlands.'" 33 C.F.R. § 328.3(c). App. A, 7a (Ninth Circuit opinion below); *Carabell I*, 391 F.3d at 708. In both cases, moreover, the Courts of Appeals concluded that the Supreme Court's decision in *SWANCC* did not limit the scope of the Corps' assertion of jurisdiction over adjacent wetlands to those in which the Corps made findings of a significant hydrological or ecological connection to navigable waters. Such jurisdictional assertions, the Courts of Appeals held, were approved by this Court in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), and *SWANCC* did not change that. App. A, 10a-11a; *Carabell I*, 391 F.3d at 709.

In a one-paragraph coda to its opinion, the Ninth Circuit added a fallback position, citing five "findings" by the Corps and remarking, "we cannot hold that these findings are arbitrary or capricious, as would be required to set them aside under the APA," *citing Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 376-77 (1989). "Taken together," the Court of Appeals wrote, "the Corps' findings would be more than sufficient to establish a significant nexus between the wetlands on the site and the flood control channels, were such a showing required." App. A, 13a.

E. Deferral of Rehearing.

On October 11, 2005, three days before the Ninth Circuit issued its decision in this case, this Court granted petitions for writs of certiorari in the *Rapanos* and *Carabell* cases. __ U.S.

__, 126 S. Ct. 414, 415 (2005). On December 5, 2005, after receiving an extension of time to seek rehearing, Baccarat timely filed a petition for rehearing and for rehearing en banc. App. F, 48a; App. G, 49a. On December 22, 2005, the Ninth Circuit announced that it would defer ruling on the rehearing petitions pending this Court's final decision in *Carabell*. App. G, 49a-50a.

F. *Rapanos* and *Carabell*.

On June 19, 2006, this Court decided the consolidated cases in *Rapanos*, vacating both Sixth Circuit judgments and remanding both cases for further proceedings. *Rapanos*, __ U.S. __, 126 S. Ct. 2208. In the plurality opinion, Justice Scalia (joined by Chief Justice Roberts, Justice Thomas, and Justice Alito) concluded that a "continuous surface [water] connection" between wetlands and other "waters of the United States" must exist in order for the Corps properly to assert jurisdiction over adjacent wetlands. *Rapanos*, 126 S. Ct. at 2226.

Concurring in the judgment, Justice Kennedy wrote that jurisdiction over adjacent wetlands requires a "significant nexus between the wetlands in question and navigable waters in the traditional sense." *Id.*, at 2248, (Kennedy, J., concurring in the judgment). "[W]etlands possess the requisite nexus, and thus come within the statutory phrase 'navigable waters,' if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.' When, in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term 'navigable waters.'" *Id.*

Justice Kennedy joined the plurality's disposition of the cases, that is, to vacate the judgment .nd remand them for further proceedings. *Id.* at 2252. Proceedings on remand

based on Justice Kennedy's opinion would, however, differ from those based on the plurality opinion. In *Carabell*, the Corps had made certain findings regarding the relationship between the wetlands and navigable waters; the District Court had concluded that the Carabell property, by virtue of its adjacency to navigable waters, had "a significant nexus to 'waters of the United States,'" *Carabell I*, 391 F.3d at 707; and the Sixth Circuit had found "no error in the District Court's decision." *Id.*, at 710. In Justice Kennedy's view, however, the Corps' factual findings, while relevant to the jurisdictional inquiry, contained "conditional language" that "could suggest an undue degree of speculation, and a reviewing court must identify substantial evidence supporting the Corps' claims. . . ." *Rapanos*, 126 S.Ct. at 2251 (Kennedy, J., concurring in the judgment). Furthermore, Justice Kennedy observed, ". . . the record gives little indication of the quantity and regularity of flow in the adjacent tributaries," and "the legal standard applied to the facts was imprecise." *Id.* Therefore, Justice Kennedy recommended that the matter be remanded for a "more specific inquiry, based on the significant nexus standard." "[A] remand is again required to permit application of the appropriate legal standard." *Id.*, at 2252.[4]

[4] Justice Kennedy suggested one exception to the requirement that a significant nexus be demonstrated on a case-by-case basis. This exception would apply when wetlands are adjacent to waters that are navigable in the traditional sense, that is, "navigable in fact, or susceptible of being rendered so." *Rapanos*, 126 S. Ct. at 2220 (Scalia, J.), *citing The Daniel Ball*, 77 U.S. 557, 10 Wall. 557 (1871). For those adjacent wetlands, according to Justice Kennedy, "showing adjacency alone" may suffice to support jurisdiction under the CWA. *Rapanos*, 126 S. Ct. at 2248 (Kennedy, J., concurring in the judgment). In this case, however, neither the Ninth Circuit nor the District Court found the Baccarat wetlands to be adjacent to navigable-in-fact waters. Rather, the wetlands are at least 65 feet removed from the ACFCD flood control channels. The flood control channels are acknowledged in this case to be jurisdictional "waters of the United States" for CWA purposes, App. A, 7a, but there is no finding and

G. Denial of Rehearing and Stay of Mandate.

On August 3, 2006, the Ninth Circuit summarily denied, without comment, Baccarat's petitions to the Ninth Circuit for rehearing and rehearing en banc. App. H, 51a-52a. On August 17, 2006, the Ninth Circuit denied a request by Baccarat for a stay of mandate. App. I, 53a. This petition followed.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

I. THE COURT SHOULD GRANT THIS PETITION BECAUSE THE NINTH CIRCUIT COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW UNDER THE CLEAN WATER ACT IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT.

A. The Ninth Circuit's standard for CWA jurisdiction over "adjacent" wetlands fails to comport with the standard for such jurisdiction recently announced by this Court in *Rapanos*.

The Ninth Circuit's principal holding below was that a "significant hydrological or ecological connection" between a wetland and navigable waters is *not* required by the CWA for the Corps to assert jurisdiction over the Baccarat wetlands. App. A, 11a. Instead, according to the Ninth Circuit, it is enough that the wetland be found by the Corps to "fall within the adjacency clause in 33 C.F.R. § 328.3(a)(7)." *Id.*, at 10a. No findings are required showing that the wetlands are "significantly intertwined" with navigable waters. *Id.*, at 9a-10a.

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no evidence that they are navigable-in-fact. Thus, the exception has no application here.

In fact, no "case-by-case" proof of a nexus is required at all. *Id.*, at 13a.

Rapanos invalidates the Ninth Circuit's principal holding in this case. In *Rapanos*, five Justices squarely rejected this standard for jurisdictional adjacency, albeit for different reasons. As stated in the plurality opinion, written by Justice Scalia, "only those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands, are 'adjacent' to such waters and covered by the Act." *Rapanos*, 126 S. Ct. at 2226. Under any view of the facts in *Baccarat*, there is no continuous surface hydrological connection between the Baccarat wetlands and the flood control channels located at least 65 feet away. App. A, 3a. Thus, under the plurality's standard for jurisdictional adjacent wetlands, there can be no CWA jurisdiction over the Baccarat wetlands.

Nor can the Ninth Circuit's standard for assertion of CWA jurisdiction be reconciled with Justice Kennedy's views as articulated in his separate opinion concurring in the *Rapanos* judgment. Justice Kennedy interpreted the CWA and the Court's case law to require the Corps to establish a "significant nexus" on a "case-by-case" basis in order to assert adjacency jurisdiction. *Rapanos*, 126 S. Ct. at 2249 (Kennedy, J., concurring in the judgment). *This is the very standard that the Ninth Circuit emphatically rejected below.* The inquiry, moreover, is not to be a superficial one. As Justice Kennedy stated, if "wetlands effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term 'navigable waters.'" *Id.*, at 2248. Contrary to the Ninth Circuit's ruling in *Baccarat*, "mere adjacency . . . is insufficient" to establish jurisdiction. *Id.*, at 2252.

By finding that the Corps' jurisdiction over "adjacent" wetlands does not depend on the existence of a significant hydro-

logical or ecological connection between the wetlands and the navigable waters subject to federal regulatory jurisdiction under the CWA, the Ninth Circuit decided an important question of federal law in a way that directly conflicts with the controlling rulings in *Rapanos*.

"When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule." *Harper v. Va. Dep't of Taxation*, 509 U. S. 86, 97 (1993). This case was still open on direct review when *Rapanos* was decided. *Déjà Vu of Nashville, Inc. v. Metropolitan Government of Nashville and Davidson County, Tennessee*, 421 F.3d 417, 420-421 (6th Cir. 2005), quoting *Bradley v. School Board of the City of Richmond*, 416 U.S. 696, 710-11 (1973) (case is "open on direct review" where the review sought is not a collateral attack on final judgment after "availability of appeal has been exhausted and lapsed, and the time to petition for certiorari has passed"). The *Rapanos* decision, having been announced and applied to the parties in those consolidated cases, "must be given full retroactive effect by all courts adjudicating federal law." *Harper*, 509 U.S. at 96, *citing James D. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991). Accordingly, the decision below must be reversed or vacated and remanded for application of the appropriate legal standard announced in *Rapanos*.

B. Remand for purposes of a redetermination of Corps jurisdiction over the Baccarat wetlands is required notwithstanding the Ninth Circuit's fallback position that a "significant nexus" exists between the Baccarat wetlands and the flood control channels.

As described above, the Ninth Circuit wrote, as a fallback position, that "even if the CWA did require demonstration of

a significant nexus on a case-by-case basis (which it does not), there is no question that one exists here." App. A, 13a. To support this statement, the Court of Appeals listed five of the Corps' six "findings" said to support the Corps' assertion of jurisdiction over the Baccarat wetlands. According to the Court of Appeals, "the Corps found (1) that the wetlands on the site are in reasonable proximity to the ACFCD flood control channels; (2) that the wetlands serve important functions that contribute to the aquatic environment in general and to the nearby tidal waters in particular; (3) that the wetlands' functions are particularly important given the reduction of wetlands in the San Francisco Bay area; (4) that the wetlands are within the 100 year floodplain of tidal waters; and (5) that the wetlands are part of a hydric soil unit that is contiguous with the area covered by tidal waters." *Id.*[5] The Court indicated that the findings were cumulative: "*[t]aken together,* the Corps' findings would be more than sufficient to establish a significant nexus. . . ." *Id.* (emphasis supplied).

This was the entire extent of the Ninth Circuit's discussion of the "significant nexus" issue. The Court provided no discussion or analysis of the existence of substantial evidence to support these "findings." For its part, the District Court did not discuss or analyze the substantiality of the evidence supporting these "findings" either, since the District Court granted summary judgment solely on the theory that "the Clean Water Act does not depend on the existence of an actual hydrological or ecological connection between the wetland and navigable waters." App. B, 22a. As a result,

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[5] The sixth "finding" cited by the Corps, not relied upon by the Ninth Circuit, was more in the nature of a legal interpretation than a finding of fact. This "finding" simply stated that the berm separating a wetland from a navigable water does not defeat CWA jurisdiction over the Baccarat wetlands. App. A, 4a. As the Corps acknowledges in the record, however, neither does the existence of the berm create jurisdiction under the CWA. App. C, 33a.

there is no indication in the record that the substantiality of the evidence supporting the Corps' findings has ever been subjected to judicial scrutiny under any conception of the term "significant nexus," let alone the standard articulated in *Rapanos*. As Justice Kennedy observed, "a reviewing court must identify substantial evidence supporting the Corps' claims, see 5 U.S.C. § 706(2)(E)." *Rapanos*, 126 S. Ct. at 2251.

None of these findings meets the tests for legitimate assertions of jurisdiction over adjacent wetlands set forth in either the plurality opinion, or in Justice Kennedy's opinion, in *Rapanos*. As explained above, the plurality view requires a "continuous surface connection" between the "adjacent wetlands" and navigable waters. None of the Corps' findings described in the opinion below, and none of the judicial descriptions of the facts, suggests a continuous surface connection between the Baccarat wetlands and the flood control channels. To the contrary, the record is devoid of even an allegation by the government of such a "continuous surface connection." For lack of this "necessary connection to covered waters," the Baccarat wetlands do not meet the standard "described as a 'significant nexus' in *SWANCC*, 531 U.S., at 167." *Rapanos*, 126 S. Ct. at 2226 (Scalia, J.). Thus, the Ninth Circuit's alternative grounds for affirming jurisdiction based on the supposed existence of a "significant nexus" directly conflicts with the plurality's opinion in *Rapanos*.

The "findings" relied upon by the Ninth Circuit also fail to meet the jurisdictional standard articulated by Justice Kennedy in his separate *Rapanos* opinion. Justice Kennedy's opinion calls, in all circumstances not involving adjacency to waters that are "navigable-in-fact," for a case-by-case consideration of "all the factors necessary to determine whether the lands in question had, or did not have, the requisite nexus." *Rapanos*, 126 S. Ct. at 2236 (Kennedy, J., concurring in the judgment). The "requisite nexus" would exist where the wetlands "sig-

nificantly affect the chemical, physical, and biological integrity of the other covered waters more readily understood as 'navigable.'" *Id.*, at 2248. Wetlands can have this effect where they perform functions such as pollutant filtering, flood control, and runoff storage, but a showing of "mere adjacency . . . is insufficient." *Id.*, at 2251-2252. Evidence of a hydrologic connection between the wetland and the navigable waters would be relevant, but not necessarily sufficient: a "mere hydrologic connection may be too insubstantial for the hydrologic linkage to establish the required nexus with navigable waters as traditionally understood." *Id.*, at 2251. In all events, a precise application of the nexus standard to the facts on a case-by-case basis is "necessary," in Justice Kennedy's view, "to avoid unreasonable applications of the statute." *Id.*, at 2249.

Although there were findings in the *Carabell* record regarding facts that might support a determination that those wetlands were indeed subject to the Corps' assertion of jurisdiction, Justice Kennedy observed that when these findings were made, "the legal standard applied to the facts was imprecise," *Id.*, at 2251, so that "a remand is again required to permit application of the appropriate legal standard." *Id.*, at 2252. In the instant case, all of the substantive proceedings took place prior to this Court's decision in *Rapanos*, and in the proceedings below the standard applied by the Ninth Circuit for federal jurisdiction over adjacent wetlands was essentially the same standard that the Sixth Circuit applied in *Carabell I*. The legal standard that the Corps and the Ninth Circuit utilized prior to *Rapanos* was no less "imprecise" when applied to the Baccarat wetlands than it was when the Corps and the Sixth Circuit applied it to the *Carabell* wetlands. As in *Carabell*, remand is required in this case to permit application of the appropriate legal standard.

Justice Kennedy's opinion also casts considerable doubt on the sufficiency or even relevance of the "findings" relied

upon by the Ninth Circuit to support its alternative holding. In this regard the "remarkable similarity," App. A, 11a, between the facts of this case and those of *Carabell* is telling. Both cases involved wetlands proximately located to a man-made water conveyance channel (or ditch), but with no hydrologic connection to the waters carried by those channels. *Rapanos*, 126 S. Ct at 2239. In *Carabell I*, the Sixth Circuit was swayed by the "mere adjacency" of the wetlands to navigable waters. In the proceedings below, the Ninth Circuit was swayed by a finding of "reasonable proximity." App. A, 31a. "Mere adjacency" was insufficient, in Justice Kennedy's view, to support jurisdiction. *Rapanos*, 126 S. Ct. at 2252. So is "reasonable proximity." [6]

In *Carabell*, the Corps referred to "the potential ability of the wetland to act as a sediment catch basin" and to ameliorate effects of "possible flooding." *Rapanos*, 126 S.Ct. at 2251. As Justice Kennedy observed, however, the "conditional language in these assessments—'potential ability,' 'possible flooding'—could suggest an undue degree of speculation, and a reviewing court must identify substantial evidence supporting the Corps' claims, see 5 U.S.C. § 706(2)(E)." *Id.* Similarly, in the instant case, the Ninth Circuit relied upon a Corps finding that the Baccarat wetlands "serve important functions" that "are particularly important given the reduction of wetlands in the San Francisco Bay area." App. A, 13a. These generalized assertions provide no more substantial evidence to support a jurisdictional finding than the

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[6] Similarly, in *Baccarat*, the Ninth Circuit referenced a finding by the Corps of "hydric soils" common to the wetlands and the tidal waters. App. A, 13a. The opinions in *Rapanos* did not mention the character of the soils in the wetlands, but the Corps in *Carabell* did discuss the existence of hydric soils in the ditch and adjoining onsite wetlands at issue in that case. See *Carabell v. U.S. Army Corps of Engineers*, 257 F.Supp. 2d 917, 926 (E.D. Mich. 2003), *aff'd*, 391 F.3d 704 (6th Cir. 2004), *vacated and remanded sub nom., Rapanos v. United States*, 126 S. Ct. 2208, 165 L. Ed. 2d 159 (June 19, 2006).

conditional assertions Justice Kennedy deemed inadequate in *Rapanos*.

The only finding in *Baccarat* that does not have a direct parallel with the findings in the *Carabell I* decision that was vacated by this Court is the Ninth Circuit's reference to the Corps' finding that the Baccarat wetlands are within the 100 year floodplain of tidal waters. App. A, 13a. While it is not self-evident why this particular finding is relevant to the question of a significant nexus, suffice for present purposes to note that Baccarat should at least have the opportunity to argue, based on *Rapanos*, that a mere *possibility* of a connection between the wetlands and tidal waters *once in a century* does not qualify as a "significant" nexus, and that, based on *Rapanos*, this finding is too "speculative or insubstantial" a factor to consider whether the Baccarat wetlands fall within the "zone fairly encompassed by the statutory term 'navigable waters.'" *Rapanos*, 126 S. Ct. at 2248.[7]

The Ninth Circuit emphasized that the findings upon which it relied for its alternative holding are findings that, "[t]aken together," would establish a significant nexus between the wetlands and the flood control channels. App. A, 13a. Thus, no one can say how the Ninth Circuit, or the Corps, for that matter, would have viewed the matter if one or more of these "findings" were given less weight, or removed from consideration altogether, in light of the Supreme Court's controlling opinions in *Rapanos*.

In sum, it is not enough simply to posit a "significant nexus" by reference to broad, untested findings in support of that claim, and then end the analysis. This Court required much more when it vacated the *Carabell* judgment in

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[7] The Ninth Circuit's opinion makes no reference to a finding (and there is none) that the wetlands have *ever* been flooded, much less flooded to the extent of forging a connection between the wetlands and navigable waters.

Rapanos, and much more is required here. Pursuant to its authority under its Rule 16.1, this Court should grant certiorari, and either vacate or make a summary disposition of reversal, and remand the matter for further proceedings in light of *Rapanos*. Failure to do so would leave intact Ninth Circuit case law that conflicts with the relevant decisions of this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 1, 2006

APPENDIX

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed October 14, 2005]

No. 03-16586
D.C. No. CV-02-03317-CW

BACCARAT FREMONT DEVELOPERS, LLC,
a California limited liability company,
Plaintiff-Appellant,

v.

UNITED STATES ARMY CORPS OF ENGINEERS; TIMOTHY A. O'ROURKE; SAN FRANCISCO STATES ARMY CORPS OF ENGINEERS; STATE WATER RESOURCES CONTROL BOARD; CELESTE CANTU, Executive Officer of State Water Resources Control Board; SAN FRANCISCO REGIONAL WATER QUALITY CONTROL BOARD; LORETTA K. BARSAMIAN, Executive Officer of San Francisco Regional Water Quality Control Board; CITY OF FREMONT,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of California
Claudia Wilken, District Judge, Presiding

Argued and Submitted
February 16, 2005—San Francisco, California

OPINION

Before: DOROTHY W. NELSON, WILLIAM A. FLETCHER, and RAYMOND C. FISHER, *Circuit Judges*.

W. FLETCHER, *Circuit Judge*:

Baccarat Fremont Developers, LLC ("Baccarat") seeks to set aside the determination by the Army Corps of Engineers (the "Corps") that under the Clean Water Act ("CWA") it has jurisdiction over 7.66 acres of wetlands located on property owned by Baccarat in Fremont, California. The Corps asserts jurisdiction based on the fact that the wetlands are adjacent to waters of the United States. Baccarat argues that after the Supreme Court's decision in *Solid Waste Agency of N. Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*"), adjacency is no longer sufficient to establish the Corps' jurisdiction under the CWA. In Baccarat's view, the Corps failed to demonstrate an adequate hydrological or ecological connection between these particular wetlands and the adjacent waters of the United States. We affirm the district court's grant of summary judgment in favor of the Corps.

I. Background

In July 1997, Baccarat purchased a 30.98 acre site ("the site") near San Francisco Bay in Fremont, California, on which it planned to develop a six-building office, research, and manufacturing facility. The site is roughly rectangular. It is bordered on the north by Cushing Parkway, on the east by Fremont Boulevard, and on the south and west by property owned by the Alameda County Flood Control District ("ACFCD"). Two ACFCD flood control channels run parallel to the southern and western boundaries of the site. The flood control channels are navigable and connect with the Bay.

The site contains 7.66 acres of wetland. The wetlands are separated from the flood control channels by man-made

berms, which follow the southern and western boundaries of the site. A maintenance road runs on top of the berms. If the berms were removed, the wetlands would connect directly to the flood control channels. Baccarat asserts that if the berms were removed, the wetlands would drain entirely. At the closest point, the wetlands are 65-70 feet from the flood control channels. The wetlands on the site are separated into six delineated areas, five of which are at issue in this case. The sixth area (designated Wetland 4) receives tidal flow through a culvert from an ACFCD channel, and the Corps' jurisdiction over the wetlands in that area is not in dispute.

In February 1998, at Baccarat's request, the Corps' San Francisco District ("the District") determined that it had jurisdiction under the CWA over 7.66 acres of wetland on the site. Baccarat then sought a permit from the District to fill 2.36 of those acres. On January 29, 2001, Baccarat requested that the Corps reconsider its jurisdiction over the wetlands on the site in light of the Supreme Court's decision in *SWANCC*. By a letter dated May 8, 2001, the District reaffirmed its determination of jurisdiction, explaining that *SWANCC* "did not eliminate the Corps' authority to regulate wetlands adjacent to a tidal waterway." The District noted that the flood control channels are "within 250 feet of the site's western and southern boundaries," and that under 33 C.F.R. § 328.3(c), the presence of the man-made berms did not defeat adjacency. Finally, the District noted that water from the wetlands would flow into the flood control channel during storms if not for the man-made berms.

Baccarat appealed the District's determination to the Corps' South Pacific Division ("the Division"). After an appeal conference and site visit, the Division issued its decision on October 25, 2001. The Division rejected Baccarat's contention that *SWANCC* modified the Corps' jurisdiction over adjacent wetlands. However, the Division found that the District had not provided sufficient evidence for its adjacency

determination, and that the District's finding that the wetlands would drain into the ACFCD channels but for the berms was irrelevant to the jurisdictional determination. The Division remanded to the District.

On January 28, 2002, the District determined once again that the wetlands on the site are adjacent to tidal waters and thus subject to the Corps' jurisdiction under the CWA. In an accompanying Memorandum for Record, the District set forth six reasons for so holding: (1) that barriers such as berms do not defeat adjacency pursuant to 33 C.F.R. § 328.3(c); (2) that the wetlands are in reasonable proximity to the ACFCD flood control channels; (3) that the wetlands serve important functions that contribute to the aquatic environment in general and to the nearby tidal waters in particular; (4) that the wetlands' functions are particularly important given the reduction of wetlands in the San Francisco Bay area; (5) that the wetlands are within the 100 year floodplain of tidal waters; and (6) that the wetlands are part of a hydric soil unit that is contiguous with the area covered by tidal waters. The District noted that it agreed with the Division that it was irrelevant to the jurisdictional determination that the wetlands would drain into the ACFCD channels but for the berms. The District's January 28, 2002, decision was the Corps' final decision under 33 C.F.R. § 331.10.

On February 6, 2002, the Corps offered Baccarat a permit to fill 2.36 acres of wetland, subject to the condition that it (1) create on-site a minimum of 2.36 acres of seasonal freshwater wetlands and (2) enhance the remaining 5.3 acres of existing brackish wetlands. Baccarat signed the permit, reserving the right to seek judicial review of the Corps' jurisdictional determination. The permit was issued on March 1, 2002.

Baccarat sued the Corps in California Superior Court, seeking declaratory and injunctive relief from the Corps' determination that it has jurisdiction under the CWA. Baccarat also named as defendants Lt. Colonel O'Rourke of the Corps; the

State Water Resources Control Board and its Director, Celeste Cantu; the San Francisco Regional Water Quality Control Board and its Executive Officer, Loretta K. Barsamian; and the City of Fremont. The suit was removed to federal district court. The district court granted the City of Fremont's motion to dismiss for lack of jurisdiction, and remanded to state court Baccarat's claims against the state defendants. The district court granted summary judgment to the Corps, holding that the Corps has jurisdiction.

II. Discussion

A. Standard of Review

We review the district court's grant of summary judgment de novo. *Universal Health Servs., Inc. v. Thompson*, 363 F.3d 1013, 1019 (9th Cir. 2004). Viewing the evidence in the light most favorable to the nonmoving party, we ask whether there are any genuine issues of material fact in dispute and whether the district court applied the relevant substantive law correctly. *Far Out Prods., Inc. v. Oscar*, 247 F.3d 986, 992 (9th Cir. 2001).

Under the Administrative Procedure Act ("APA"), we may set aside an agency decision if it is "arbitrary, capricious, or an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A). The arbitrary and capricious standard is appropriate for the resolution of factual disputes implicating substantial agency expertise. *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 375-76 (1989). In reviewing an agency decision under the APA, we ask whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. *Id.* at 378. We may reverse under the arbitrary and capricious standard only if the agency has

> relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision

> that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Pacific Coast Fed'n of Fishermen's Ass'ns, Inc. v. National Marine Fisheries Serv., 265 F.3d 1028, 1034 (9th Cir. 2001) (citation omitted).

B. The Corps' Adjacency Jurisdiction

We conclude that the Corps has jurisdiction over wetlands under the Clean Water Act, 33 U.S.C. §§ 1251 *et seq.* The CWA prohibits the discharge of pollutants into navigable waters. *See* 33 U.S.C. §§ 1311(a), 1344(b), 1344(d) and 1362(12). "The term 'navigable waters' means the waters of the United States." 33 U.S.C. § 1362(7). The Corps has issued a regulation defining "waters of the United States" as follows:

> (a) The term "waters of the United States" means
>
> (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
>
> * * *
>
> (3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters;
>
> * * *
>
> (5) Tributaries of waters identified in paragraphs (a)(1) through (4) of this section;
>
> * * *

> (7) *Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1) through (6) of this section.*

33 C.F.R. § 328.3 (emphasis added). The regulations further provide that the term "'adjacent' means bordering, contiguous, or neighboring," and they specify that "[w]etlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent wetlands.'" 33 C.F.R. § 328.3(c).

The parties agree that the ACFCD flood control channels contain waters of the United States. The Corps determined that the wetlands on Baccarat's site are adjacent to the flood control channels, thus placing them within the jurisdiction of the Corps pursuant to the adjacency clause in 33 C.F.R. § 328.3(a)(7). Baccarat argues that adjacency alone is insufficient to support the Corps' jurisdiction. In Baccarat's view, for the Corps to have jurisdiction, there must be a significant hydrological or ecological connection between the wetlands and the jurisdictional water on which the adjacency determination is based.

The text of the CWA and the implementing regulations promulgated by the Corps give no indication that a significant hydrological or ecological connection is a condition of Corps jurisdiction over adjacent wetlands. Baccarat relies on the Supreme Court's decision in *SWANCC* to support its contention that adjacent wetlands must be hydrologically or ecologically connected to waters of the United States. *SWANCC*, however, did not address the Corps' adjacency jurisdiction. Rather, it invalidated the Corps' Migratory Bird Rule.

Under the Migratory Bird Rule, the Corps asserted jurisdiction based on the CWA over intrastate waters that migratory birds used as a habitat. *SWANCC*, 531 U.S. at 163-64. The waters at issue in SWANCC were "isolated ponds, some only seasonal, wholly located within two Illinois counties." *Id.* at

171. The Court held that the Migratory Bird Rule was not "fairly supported by the CWA," *id.* at 167, on the ground that reading the CWA to extend jurisdiction to inland ponds like those at issue in *SWANCC* would effectively read the term "navigable waters" out of the statute. *Id.* at 171-72. The Corps did not assert that the waters at issue in *SWANCC* were adjacent to waters of the United States, and the Court's opinion did not address the Corps' jurisdiction over adjacent wetlands.

The Supreme Court had explicitly addressed the Corps' jurisdiction over adjacent wetlands based on the CWA in an earlier case, *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985). In that case, the Court unanimously upheld the Corps' jurisdiction over wetlands adjacent to waters of the United States, reasoning that "the Corps' ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act." *Id.* at 134. In so holding, the Court acknowledged that some adjacent wetlands might not be environmentally significant to their adjoining bodies of water. Nevertheless, the Court concluded that the Corps had acted properly in defining all adjacent wetlands as waters of the United States. *Id.* at 135. In footnote 9, the Court wrote:

> Of course, it may well be that not every adjacent wetland is of great importance to the environment of adjoining bodies of water. But the existence of such cases does not seriously undermine the Corps' decision to define all adjacent wetlands as "waters." If it is reasonable for the Corps to conclude that in the majority of cases, adjacent wetlands have significant effects on water quality and the aquatic ecosystem, its definition can stand. That the definition may include some wetlands that are not significantly intertwined with the ecosystem of adjacent waterways is of little moment, for where it appears that a

> wetland covered by the Corps' definition is in fact lacking in importance to the aquatic environment—or where its importance is outweighed by other values—the Corps may always allow development of the wetland for other uses simply by issuing a permit.

Id. at 135 n.9 (citation omitted). In this passage, the Court rejected the idea that for the Corps to have jurisdiction over adjacent wetlands it must demonstrate a significant hydrological or ecological connection between the particular wetlands in question and the jurisdictional water to which it is adjacent. As the Court explained, the fact that the Corps has determined that the majority of adjacent wetlands have significant effects on neighboring aquatic ecosystems is sufficient to support the Corps' assertion of jurisdiction over other wetlands that are not "significantly intertwined" with such ecosystems.

Baccarat argues that we should read footnote 9 of *Riverside Bayview Homes* differently. According to Baccarat,

> refusing to invalidate a regulatory "definition" on the grounds that "not every adjacent wetland is of great importance to the environment of adjoining bodies of water" is not the same thing as saying that in an individual case requiring a jurisdictional delineation by the Army Corps, *no* evidence of a hydrological and ecological connectivity is required. Every jurisdictional claim made by the Army Corps must be factually based. Otherwise, the Army Corps' claim of jurisdiction is arbitrary and capricious for failure to articulate a rational connection between the facts found and the choice made.

In our view, Baccarat misreads footnote 9. According to the Supreme Court, when the Corps is confronted with adjacent wetlands that are not "significantly intertwined" with the ecosystem of adjacent waterways, it "may . . . allow development . . . simply by issuing a permit." 474 U.S. at 135 n.9. Thus, the Court clearly contemplates the Corps' jurisdiction

over adjacent wetlands, even when they lack a significant ecological connection with waters of the United States. Otherwise the issuance of a permit would be both unnecessary and ultra vires. We do not read *Riverside Bayview Homes* to deprive the Corps of jurisdiction over particular wetlands that fall within the adjacency regulation if they lack a significant hydrological or ecological connection to waters of the United States. Rather, under *Riverside Bayview Homes*, the Corps' determination that a majority of adjacent wetlands have important ecological connections to waters of the United States is sufficient to support its regulations establishing jurisdiction over other adjacent wetlands that fall within the adjacency clause in 33 C.F.R. § 328.3(a)(7).

Baccarat's reading of *SWANCC* is similarly unpersuasive. *SWANCC* did not retreat from the view expressed in *Riverside Bayview Homes* that the Corps' determination that the majority of adjacent wetlands have an ecological connection to waters of the United Sates is sufficient to support broader jurisdiction over other adjacent wetlands. Indeed, *SWANCC* repeatedly referred to the holding of Riverside Bayview Homes—"that § 404(a) [of the CWA] extend[s] to nonnavigable wetlands adjacent to open waters"—without giving any indication that it intended to modify or overrule that unanimous ruling. *Id.* at 167-68, 172.

SWANCC simply did not address the issue of jurisdiction over adjacent wetlands. The Court noted in *SWANCC* that to hold for the Corps, it would have "to hold that the jurisdiction of the Corps extends to ponds that are not adjacent to open water." *Id.* at 168 (emphasis in original). The fact that the Court in *SWANCC* refused to allow the Corps to extend its jurisdiction to waters that are not adjacent to jurisdictional waters on the basis of migratory bird patterns has no bearing on its earlier holding that the Corps has jurisdiction over wetlands that are adjacent to jurisdictional waters.

Our decision in *Headwaters, Inc. v. Talent Irrigation District*, 243 F.3d 526 (9th Cir. 2001), does not support the conclusion that a significant hydrological or ecological connection is necessary for Corps jurisdiction over adjacent wetlands. In *Headwaters*, we upheld the EPA's jurisdiction over irrigation canals, finding that they were "tributaries" and thus fell within the regulatory definition of "waters of the United States." We distinguished *SWANCC* by noting that the irrigation canals were not isolated, but rather "receive[d] water from natural streams and lakes, and . . . [were] connected as tributaries to other 'waters of the United States.'" *Id.* at 533. *Headwaters* might be read to suggest that when the question is whether a water is properly classified as a "tributary" subject to Corps jurisdiction, that water must exchange water, at least intermittently, with a water of the United States. However, *Headwaters* cannot be read to address the different question at issue here—whether a significant hydrological or ecological connection to a particular adjacent wetland is required for Corps jurisdiction.

Baccarat's contention that a significant hydrological or ecological connection is required to support the Corps' jurisdiction over particular adjacent wetlands is thus not supported by the CWA, by the implementing regulations, by Supreme Court case law, or by our case law. We hold that no such connection is required, and that the district court appropriately granted the Corps' motion for summary judgment.

In so holding, we join the Sixth Circuit in rejecting the idea that *SWANCC* modified the holding of *Riverside Bayview Homes*. *See Carabell v. U.S. Army Corps of Engineers*, 391 F.3d 704 (6th Cir. 2004). The facts in *Carabell* are remarkably similar to the facts here. The Carabells sought permission to fill 15.9 acres of wetland. The Corps declined to issue a permit. The Carabells then brought suit in federal court, arguing that the Corps lacked jurisdiction over the wetlands. The court described the relationship of the plaintiffs' wetlands to waters of the United States as follows:

> The record here establishes that the unnamed ditch running along the hypotenuse of the Carabells' triangle-shaped property is separated from wetlands only by a man-made berm or barrier. At its northeastern end, the ditch is connected to the Sutherland-Oemig Drain, a drain that empties into the Auvase Creek, which, in turn, empties into Lake St. Clair, which connects to Lake Huron and Lake Erie. At its southwestern end, the ditch is connected to other ditches, which—like the Sutherland-Oemig Drain—outlet into the Auvase Creek and eventually into Lake St. Clair. The ditch, then, is connected on either end to tributaries of "waters of the United States" as defined in the regulations.

Id. at 708. The Sixth Circuit concluded that

> [b]ecause the wetlands on the Carabells' property are separated from a tributary of "waters of the United States" only by a man-made berm or barrier, they are considered "adjacent wetlands" under § 328.3(a)(7). As such, the wetlands at issue fall within the jurisdiction of the Corps for purposes of the CWA.

Id. at 708-09.

Like Baccarat, the Carabells argued that *SWANCC* modified *Riverside Bayview Homes* and limited the Corps' jurisdiction over adjacent wetlands. The Sixth Circuit emphatically rejected the argument:

> In *SWANCC* . . . the Court did not alter the *Riverside-Bayiew* holding. Indeed, while noting Congress's "unequivocal acquiescence to, and approval of, the Corps' regulations interpreting the CWA to cover wetlands adjacent to navigable waters," the *SWANCC* Court did not decide any issue with regard to "adjacent wetlands" under 33 C.F.R. § 328.3(a)(7).

391 F.3d at 709 (citation omitted).

We note that even if the CWA did require demonstration of a significant nexus on a case-by-case basis (which it does not), there is no question that one exists here. In making its jurisdictional determination, the Corps found (1) that the wetlands on the site are in reasonable proximity to the ACFCD flood control channels; (2) that the wetlands serve important functions that contribute to the aquatic environment in general and to the nearby tidal waters in particular; (3) that the wetlands' functions are particularly important given the reduction of wetlands in the San Francisco Bay area; (4) that the wetlands are within the 100 year floodplain of tidal waters; and (5) that the wetlands are part of a hydric soil unit that is contiguous with the area covered by tidal waters. Even viewing the evidence in the light most favorable to Baccarat, we cannot hold that these findings are arbitrary or capricious, as would be required to set them aside under the APA. Marsh, 490 U.S. at 376-77. Taken together, the Corps' findings would be more than sufficient to establish a significant nexus between the wetlands on the site and the flood control channels, were such a showing required.

Conclusion

In *Riverside Bayview Homes*, the Supreme Court upheld the Corps' exercise of jurisdiction over adjacent wetlands as defined in 33 C.F.R. § 328.3(c). *SWANCC* did not modify *Riverside Bayview Homes*. The Corps' jurisdiction over wetlands falling within the adjacency clause in 33 C.F.R. § 328.3(a)(7) does not depend on the existence of a significant hydrological or ecological connection between the particular wetlands at issue and waters of the United States. Since there is no genuine issue of material fact in dispute as to whether the wetlands on the site fall within the Corps' jurisdiction, we affirm the district court's grant of summary judgment.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 02-3317 CW

BACCARAT FREMONT DEVELOPERS,
Plaintiff,

v.

U.S. ARMY CORPS OF ENGINEERS, *et al.*,
Defendants.

JUDGMENT

This action came on for hearing on the motion for summary judgment filed by Defendants United States Army Corps of Engineers and Lt. Col. Timothy O'Rourke (Federal Defendants) before the Court, the Honorable Claudia Wilken, District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

It is Ordered and Adjudged that Plaintiff Baccarat Fremont Developers take nothing, that the action be dismissed on the merits and that Federal Defendants recover of Plaintiff their costs of action.

IT IS SO ORDERED.

Dated: 8/11/03

/s/ Claudia Wilken
CLAUDIA WILKEN
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 02-3317 CW

BACCARAT FREMONT DEVELOPERS,
Plaintiff,

v.

U.S. ARMY CORPS OF ENGINEERS, *et al.*,
Defendants.

ORDER GRANTING FEDERAL DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants United States Army Corps of Engineers and Lt. Col. Timothy O'Rourke (Federal Defendants) move for summary judgment. Plaintiff Baccarat Fremont Developers (Baccarat) opposes this motion. The matter was heard on March 14, 2003. Having considered all of the papers filed by the parties and oral argument on the motion, the Court GRANTS Federal Defendants' motion.

BACKGROUND[1]

Baccarat is a California company and the developer of the Fremont-Cushing Plaza Project, located on 30.98-acre site in Fremont, California. The United States Army Corps of Engineers (the Corps) is a federal agency having jurisdiction to regulate certain activities in navigable waters of the United States under the Clean Water Act. Lt. Col. Timothy O'Rourke is the District Engineer for the San Francisco District of the Corps. Baccarat contests Defendants' assertion of regulatory

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[1] Except where noted that an issue of fact is disputed, or that one party makes certain allegations or contentions, the facts below are undisputed.

jurisdiction over seasonal wetlands located on the Fremont-Cushing Plaza Project site.

The Fremont-Cushing Plaza Project site is roughly rectangular. It is bounded on the north by Cushing Parkway, on the east by Fremont Boulevard, and on the south and west by property owned by the Alameda County Flood Control District (ACFCD). Berms located on the ACFCD property separate the wetlands from a flood control channel operated by the ACFCD. A maintenance road sits atop the berms. The berms and road abut the western and southern boundaries of the wetlands.

The project site contains approximately 7.66 acres of seasonal wetlands in six delineated sites identified as 1a, 2a, 3, 4, 5a and 6a in Federal Defendants' Wetland Delineation Map. Wetlands 1a, 3, 6a and 7a are located at the south and west edges of the site. Wetlands 2a and 5a are located near the center of the site. Wetland 4, a 0.48-acre site, receives restricted tidal flow through a culvert from an ACFCD culvert. Baccarat does not contest the Corps' assertion of jurisdiction over wetland 4 under 33 U.S.C. § 403. Wetlands 1a, 2a, 3, 5a and 6a will be referred to hereafter as the "contested wetlands."

The administrative record includes "site notes," dated April 17, 2001, prepared by Philip Shannin, a project manager with the regulatory division of the Corps. These notes state that "if not for [the berms] . . . wetlands [1a, 3, 6a and 7a] would directly connect to the [tidal flood control] channels." The notes further state that because of a hard clay layer in the site's soil, "water seepage from . . . wetlands [2a and 5a] is very slow." According to the notes, "given the shallow depth of these wetlands [2a and 5a] and the hardness of the soil, water collected in these wetlands in storm events would flow out of these wetlands." The notes conclude that because the elevation of the site decreases as one approaches the flood control channels, "it seems likely that the water in these wet-

lands [2a and 5a] would flow into the tidal flood control channels, if not for the man-made berms." Baccarat emphasizes that, according to the administrative record, water from the wetlands does not flow into the channels because of the berms.

In February, 1998, Baccarat sought, pursuant to § 404 of the CWA, a permit from the Corps to discharge fill material in approximately 2.36 acres of the wetlands as part of its plans to construct commercial buildings on the project site. Under Section 401 of the Clean Water Act, an applicant for a Section 404 permit must first obtain a certification from a State agency attesting that any such discharge will comply with the Clean Water Act. 33 U.S.C. § 1341(a)(1). In June, 2001, Defendant San Francisco Regional Water Quality Control Board (Regional Board) issued to Baccarat a Conditional Water Quality Certification and Waiver of Discharge Requirements. In January, 2002, the Regional Board imposed certain conditions on the certification. One of the conditions, referred to as the "Mitigation Condition," requires that Baccarat create on-site a minimum of 2.36 acres of seasonal freshwater wetlands and enhance the remaining 5.3 acres of existing brackish wetlands within twelve months of the commencement of stockpiling fill on the site. On March 1, 2002, the Corps countersigned the permit, thereby making the permit effective. The permit requires that Baccarat satisfy the Mitigation Condition.

On June 26, 2002, Baccarat brought an action in State superior court, seeking declaratory and injunctive relief.[2] On

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[2] Baccarat previously challenged the Army Corps' jurisdiction over the wetlands through an administrative process. In January, 2001, Baccarat asked the Army Corps to reconsider its determination that it had jurisdiction, in light of *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001). In May, 2001, the Army Corps denied Baccarat's request. Baccarat appealed the decision. In October, 2001, the South Pacific Division of the Army Corps concluded

July 10, 2002, Federal Defendants removed the entire State court action to this Court pursuant to 28 U.S.C. §§ 1441, 1442(a)(1) and 1442a. The claims against Defendants State Water Resources Control Board; Celeste Cantu, Executive Officer of the State Board; San Francisco Regional Water Quality Control Board; Loretta K. Barsamian, Executive Officer of the Regional Board; and City of Fremont were dismissed or remanded to State court by this Court's October 16, 2002 order.

In its remaining causes of action, Baccarat seeks a judicial declaration that the Corps does not have jurisdiction to regulate the disputed wetlands and seeks to enjoin Lt. Col. O'Rourke from enforcing the Mitigation Condition based on this alleged lack of jurisdiction. On January 10, 2003, Federal Defendants filed their motion for summary judgment on these remaining causes of action.

DISCUSSION

I. Legal Standard

A. Summary Judgment

Summary judgment is properly granted when no genuine and disputed issues of material fact remain, and when, viewing the evidence most favorably to the non-moving party, the movant is clearly entitled to prevail as a matter of law. Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Eisenberg v. Ins. Co. of N. Am.*, 815 F.2d 1285, 1288-89 (9th Cir. 1987).

The moving party bears the burden of showing that there is no material factual dispute. Therefore, the court must regard as true the opposing party's evidence; if supported by affi-

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that the jurisdictional determination was not supported by substantial evidence in the administrative record and remanded the matter to the San Francisco District of the Army Corps. In January, 2002, the Army Corps reaffirmed its initial jurisdictional determination.

davits or other evidentiary material. *Celotex*, 477 U.S. at 324; *Eisenberg*, 815 F.2d at 1289. The court must draw all reasonable inferences in favor of the party against whom summary judgment is sought. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Intel Corp. v. Hartford Accident & Indem. Co.*, 952 F.2d 1551, 1558 (9th Cir. 1991).

Material facts which would preclude entry of summary judgment are those which, under applicable substantive law, may affect the outcome of the case. The substantive law will identify which facts are material. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

Where the moving party does not bear the burden of proof on an issue at trial, the moving party may discharge its burden of showing that no genuine issue of material fact remains by demonstrating that "there is an absence of evidence to support the nonmoving party's case." *Celotex*, 477 U.S. at 325. The moving party is not required to produce evidence showing the absence of a material fact on such issues, nor must the moving party support its motion with evidence negating the non-moving party's claim. *Id.; see also, Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 885 (1990); *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1409 (9th Cir. 1991), *cert. denied*, 502 U.S. 994 (1991). If the moving party shows an absence of evidence to support the nonmoving party's case, the burden then shifts to the opposing party to produce "specific evidence, through affidavits or admissible discovery material, to show that the dispute exists." *Bhan*, 929 F.2d at 1409. A complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial. *Celotex*, 477 U.S. at 323.

B. APA Standard of Review

Challenges to final agency actions are subject to the review provisions of the Administrative Procedures Act (APA). *See,*

e.g., Southwest Center for Biological Diversity v. Bureau of Reclamation, 143 F.3d 515, 522 (9th Cir. 1998). The Corps' assertion of regulatory jurisdiction over the wetlands is a final agency action subject to review under the APA.

Under the APA, agency decisions may be set aside only if "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *Ariz. Cattle Growers' Ass'n v. United States Fish & Wildlife Serv.*, 273 F.3d 1229, 1236 (9th Cir. 2001).[3] To determine whether an agency action was arbitrary and capricious, the court must "determine whether the agency articulated a rational connection between the facts found and the choice made." *Ariz. Cattle Growers' Ass'n*, 273 F.3d at 1236.

"[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973); *see also Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985); *Southwest Center for Biological Diversity v. United States Forest Service*, 100 F.3d 1443, 1450 (9th Cir. 1996). The Ninth Circuit has held, "The task of the reviewing court is to apply the appropriate APA standard of review, 5 U.S.C. § 706, to the agency decision based on the record the agency presents to the reviewing court." *Friends of the Earth v. Hintz*, 800 F.2d 822, 829 (9th Cir. 1986); *Southwest Center*, 100 F.3d at 1450-51.

As long as the agency decision was based on a consideration of relevant factors and there is no clear error of

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[3] Baccarat cites the decision of the Honorable Charles A. Legge of this Court in *Leslie Salt Co. v. United States*, 660 F. Supp. 183, 185 (N.D. Cal. 1987) to argue that a *de novo* standard of review should apply in this Court's examination of the Corps' assertion of jurisdiction. However, as Federal Defendants point out, Judge Legge ultimately determined that an arbitrary and capricious standard should apply in reviewing the Corps' assertion of jurisdiction. *See Leslie Salt Co. v. United States*, 789 F. Supp. 1030, 1033 (N.D. Cal. 1991).

judgment, the reviewing court may not overturn the agency's action. *See id.* (citing *Am. Hosp. Ass'n v. NLRB*, 499 U.S. 606 (1991)). In particular, the reviewing court must defer to the agency's decision when the resolution of the dispute involves issues of fact or requires a high level of technical expertise. *See Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 377 (1989); *Cen. Ariz. Water Conservation Dist. v. EPA*, 990 F.2d 1531, 1539-40 (9th Cir. 1993). Accordingly, the court may set aside only those conclusions that do not have a basis in fact, not those with which it disagrees. *See Ariz Cattle Growers' Ass'n*, 273 F.3d at 1236.

C. Clean Water Act

The Clean Water Act provides that "any discharge of dredged or fill materials into 'navigable waters'—defined as the 'waters of the United States'—is forbidden unless authorized by a permit issued by the Corps of Engineers pursuant to § 404 [of the Clean Water Act, 33 U.S.C. § 1344]." *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 123 (1985) (also citing 33 U.S.C. §§ 1311, 1362). As defined in the governing regulations, "waters of the United States" include:

> (a)(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide; . . .
>
> (5) Tributaries of waters identified in paragraphs(a)(1) through (4) of this section; . . .
>
> (7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1) through (6) of this. section.

33 C.F.R. §§ 328.3(a)(1), (5) and (7). The regulations further state:

> The term "adjacent" means bordering, contiguous, or neighboring. Wetlands separated from other waters of

> the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent wetlands."

Id. at § 328.3(c).

II. Federal Defendants' Motion

It is undisputed that the flood control channels to the west and south of the site are waters of the United States subject to Clean Water Act § 404 jurisdiction. According to the Shannin notes contained in administrative record, wetlands la, 3, 6a and 7a would directly connect to the channels but for the berms. The Shannin notes further state that storm water from wetlands 2a and 5a would also flow down hill across the site and into the channels, if not for the berms. The Court concludes that the contested wetlands are separated from the channels by the berms, which are man-made barriers, and the contested wetlands are therefore "adjacent wetlands," under the meaning of 33 C.F.R. § 328.3(c), over which the Corps has regulatory jurisdiction. The facts of this case are analogous to those in *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526 (9th Cir. 2001), in which the Ninth Circuit concluded that canals that were separated from navigable waters by closed waste gates were nevertheless subject to § 404 jurisdiction.[4]

Baccarat argues that the contested wetlands are not subject to the Corps' jurisdiction because there is no hydrological or ecological connection between these wetlands and navigable waters. Baccarat's argument is based on an erroneous legal standard. The Corps' regulatory jurisdiction over adjacent wetlands under the Clean Water Act does not depend on the existence of an actual hydrological or ecological connection between the wetland and navigable waters. The Supreme

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[4] The Ninth Circuit in *Headwaters* did not specifically address adjacency under 33 C.F.R. § 328.3(c).

Court has rejected this position in upholding the Corps' adjacent wetlands regulation:

> [I]t may well be that not every adjacent wetland is of great importance to the environment of adjoining bodies of water. But the existence of such cases does not seriously undermine the Corps' decision to define all adjacent wetlands as "waters." If it is reasonable for the Corps to conclude that in the majority of cases, adjacent wetlands have significant effects on water quality and the aquatic ecosystem, its definition can stand. That the definition may include some wetlands that are not significantly intertwined with the ecosystem of adjacent waterways is of little moment, for where it appears that a wetland covered by the Corps' definition is in fact lacking in importance to the aquatic environment—or where its importance is outweighed by other values—the Corps may always allow development of the wetland for other uses simply by issuing a permit.

Riverside, 474 U.S. at 135, n.9. *See also Headwaters*, 243 F.3d at 533-34.

The Supreme Court's subsequent decision in *Solid Waste Agency of Northern Cook County (SWANCC) v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) did not alter this holding. As Federal Defendants point out, *SWANCC* addressed the application of a "migratory bird rule" to isolated "ponds," as defined under 33 C.F.R. § 328.3(a)(3), that were not adjacent to waters of the United States. The decision did not address wetlands adjacent to waters of the United States covered by § 328.3(a)(7). *See SWANCC*, 531 U.S. at 167 (noting "Congress' unequivocal acquiescence to, and approval of, the Corps' regulations interpreting the CWA to cover wetlands adjacent to navigable waters"); *Headwaters*, 243 3d at 533-34 (holding that the canals at issue were not "isolated waters" within the meaning of *SWANNC*).

Baccarat cites several other post-*SWANNC* opinions that it contends hold that *SWANNC* overruled *Riverside* such that any wetland without an actual ecological or hydrological connection to a navigable water is not subject to § 404 jurisdiction. *See United States v. Lamplight Equestrian Center, Inc.*, 2002 WL 360652 (N.D. Ill. 2002); *Brace v. United States*, 51 Fed. Cl. 649 (Fed. Cl. 2002); *United States v. Krilich*, 152 F. Supp. 2d 983 (N.D Ill. 2001). However, none of these cases involves a wetland separated from navigable waters by a man-made barrier. *See Lamplight*, 2002 WL 360652 at *8-9 (involving wetland that was contiguous with navigable waters); *Brace*, 51 Fed. Cl. 649, 653 (noting "paucity of record" regarding adjacency); *United States v. Krilich*, 948 F. Supp. 719, 722 (N.D. Ill. 1996) (involving a "bowl-shaped depression" that was agreed to be "not adjacent to any other surface water"). Therefore, none held that separation by a man-made barrier is sufficient to prevent a wetland from being subject to § 404 jurisdiction.

CONCLUSION

Because the Court grants Federal Defendants' motion for summary judgment, the Court DENIES as moot Federal Defendants' motion to strike the declaration of Michael Josselyn (Docket No. 43).

For the foregoing reasons, Federal Defendants' motion (Docket No. 28) is GRANTED. Judgment shall enter accordingly. Federal Defendants shall recover their costs from Plaintiff.

IT IS SO ORDERED.

Dated: 8/11/03

/s/ Claudia Wilken
CLAUDIA WILKEN
United States District Judge

APPENDIX C

ADMINISTRATIVE APPEAL DECISION

APPROVED JURISDICTIONAL DETERMINATION
FOR BACCARAT FREMONT DEVELOPERS

FILE NO. 23205S

SAN FRANCISCO DISTRICT

October 25, 2001

Review Officer: Douglas R. Pomeroy, U.S. Army Corps of Engineers (USAGE), South Pacific Division, San Francisco, California

Technical Assistant to Review Officer: Bruce Henderson, USAGE, Los Angeles District, Ventura Field Office, Ventura, California

District Representative: Philip Shannin, USACE, San Francisco District, San Francisco, California

Appellant Representative: Michael Josselyn, Wetlands Research Associates, San Rafael, California

Receipt of Request For Appeal (RFA): July 9, 2001

Appeal Conference Date: September 5, 2001

Site Visit Date: September 5, 2001

Background Information: The project site is an approximately 32-acre, generally rectangular, parcel located in Fremont, Alameda County, California, near the San Francisco Bay. The site is separated from Alameda County Flood Control District (ACFCD) channels by approximately 250 feet of upland area on the west side and south sides of the property. The ACFCD channels connect to San Francisco Bay. Culverts with flap gates are present at several locations between the ACFCD channels and the wetlands. A culvert with a leaking flap gate connects with one wetland, which the District and the Appellant agreed was within Corps jurisdiction.

The District and the Appellant agree that there are wetlands on the project site. The District and the Appellant disagree as to whether all the wetlands on the project site are subject to the Corps jurisdiction as adjacent wetlands.

Summary of Decision: I remand this approved jurisdictional determination to the District to reconsider and further document and/or modify its conclusions regarding which wetlands on the project site are adjacent to jurisdictional waters of the United States. In completing this reconsideration. the District will follow the specific instructions identified in this Administrative Appeal Decision.

Appeal Evaluation, Findings and Instructions to the San Francisco District Engineer (DE):

Reason 1: The Appellant asserts that the District did not identify sufficient hydrological, ecological, proximity, or interstate commerce connections to establish the wetlands at issue were subject to Corps jurisdiction as wetlands adjacent to waters of the United States. The Appellant believes these are isolated wetlands and should be evaluated pursuant to the Supreme Court decision in *Solid Waste Agency of Northern Cook County v. United States*, 531 U.S. 159 (January 9, 2001) (*SWANCC* Decision). As a matter of fact, the Appellant believes these areas would be outside Corps regulatory jurisdiction if evaluated as isolated wetlands.

FINDING: The appeal has merit

ACTION: The District is directed to reconsider its adjacency determination as described in detail in this Administrative Appeal Decision.

DISCUSSION: The District and Appellant estimate the 32-acre, generally rectangular, project site includes 7.66 acres of wetlands in six distinct delineated areas. Jurisdictional channels of the ACFCD are located approximately 250 feet west and south of the site. Considering the site as four quadrants the wetlands are distributed as described below.

In the southwest quadrant, about one half of the quadrant is covered by a single, large wetland area (separate acreage figures for each wetland were not available) described by points 1a, 6a, and 7a, in the "Delineation of Jurisdictional Wetlands and Waters of the United States, Mok Property, Fremont, California" by Wetlands Research Associates dated August 1997 (Delineation Report). This same wetland extends into a portion of the southeast quadrant. The District and the Appellant disagree on its jurisdictional status.

The northwest quadrant includes a wetland on the western edge of the site, described by point 4a in the Delineation Report, which receives water from a culvert with leaking flap gate. The District and the Appellant agreed this area was subject to Corps jurisdiction and it is not discussed further. The northwest quadrant also includes another small wetland, also on the western edge of the site, described by point 3 in the Delineation Report. The District and the Appellant disagree on its jurisdictional status.

The northeast quadrant contains a large wetland described by point 2a in the Delineation Report. Just west of this wetland, in the center of the project site, there are two additional small wetlands. One is described by point 5a in the Delineation Report and the other is not separately documented. These three wetlands, mapped as separate units, are located at a greater distance from the jurisdictional waters of ACFCD channels than the wetlands described in the previous two paragraphs. The District and the Appellant disagree on the jurisdictional status of these three wetlands.

Culverts with flap gates are present at several locations on a property located between the Appellant's project site and the ACFCD channel. The Appellant does not own this intervening property. On the Administrative Appeal site visit the Review Officer found these culverts had been recently blocked. The District is aware of this new information and

will separately investigate whether any enforcement action is appropriate.

The District and the Appellant agree that the ACFCD channels are subject to Rivers and Harbors Act, Section 10 jurisdiction, and the Clean Water Act Section 404 jurisdiction. The Appellant's position is that the District's evaluation of adjacency is incorrect and should change as a result of the *SWANCC* decision, and the *SWANCC* decision's interpretation of *United States v. Riverside Bayview Homes, Inc.* 474 U.S. 121 (1985). The Appellant asserts the District should have evaluated whether a "significant nexus" existed between jurisdictional waters in the ACFCD channel and the areas the District identified as adjacent wetlands.

The Appellant claims the Corps did not establish sufficient hydrological, ecological, proximity, and interstate commerce connections between the jurisdictional waters and the supposedly adjacent wetlands for the Corps to establish regulatory jurisdiction. The Appellant believes that the wetland areas in question are isolated, not adjacent, wetlands, and if considered pursuant to the *SWANCC* decision, those areas would be outside Corps regulatory jurisdiction.

The Appellant believed his case was further supported by *United States v. Banks*, 115 F.3d 916 (11th Cir. 1997), which he cited as support that evidence of hydrological and ecological links between wetlands and the adjoining river were *necessary* to establish jurisdiction over adjacent waters, and that mere physical proximity was not enough.

The District's position is that the wetlands on the project site are within Corps jurisdiction because they are within 250 feet of the jurisdictional waters in the ACFCD flood control channels. In addition, the District asserts these areas would drain to the flood control channel if the man-made barriers were not present.

The Corps regulation regarding jurisdiction over wetlands adjacent to jurisdictional waters is defined at 33 CFR Part 328.4 (b) and 4 (c):

> "(b) Tidal Waters of the United States. The landward limits of jurisdiction in tidal waters:
>
> (1) Extends to the high tide line, or
>
> (2) When adjacent non-tidal waters of the United States are present, the jurisdiction extends to the limits identified in paragraph (c) of this section.
>
> (c) Non-Tidal Waters of the United States. The limits of jurisdiction in non-tidal waters:
>
> (1) In the absence of adjacent wetlands, the jurisdiction extends to the ordinary high water mark. or
>
> (2) When adjacent wetlands are present, the jurisdiction extends beyond the ordinary high water mark to the limit of the adjacent wetlands."

The term adjacent is defined in the Corps regulations at 33 CFR 328.3 (c) as:

> "(c) The term adjacent means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent wetlands."" [Emphasis added]

The adjacency concept was further discussed in the Preamble to the Corps 1977 regulations 42 Fed Reg page 37129 (1977), which stated:

> ". . . we have defined the term "adjacent" to mean "bordering, contiguous, or neighboring." The term would include wetlands that directly connect to other waters of the United States, or *that are in reasonable proximity* to these waters but physically separated from them by man-

> made dikes or barriers, natural river berms, beach dunes, *and similar obstructions*." [Emphasis added]

In the Preamble to the Final Rule to issue the Nationwide Permits in 1991, 56 Fed Reg Page 59113 (1991), the Corps discussed the validity of establishing a nationwide distance limit for adjacency. It was discussed as follows:

> "Two commenters recommended that we establish a distance limit for adjacency. We believe that this would be an unreasonable approach due to the potential variability of the factors utilized in establishing adjacency for each individual project such as man-made barriers and natural berms."

A similar difficulty exists for Corps Districts in establishing a specific distance limit across variable geographic areas and site conditions.

The Joint Memorandum from Environmental Protection Agency General Counsel and Corps of Engineers Chief Counsel on the SWANCC decision dated January 19, 2001, concluded that the Supreme Court in *SWANCC*:

> ". . . did not overrule the holding or rationale of United States v. Riverside Bayview Homes . . ."

The Corps Headquarters, Operations Division, Memorandum of May 11, 2001, prohibits Regulatory Offices in Major Subordinate Commands (MSCs, also called Divisions) and District Commands, from developing or utilizing new local practices for determining the extent of Clean Water Act Section 404 regulatory jurisdiction, or from utilizing local practices that were not in effect prior to the January 9, 2001 *SWANCC* decision. This is in order to minimize complications affecting the development and promulgation of National Policy subsequent to *SWANCC* in connection with interagency efforts to address Clean Water Act jurisdiction related to the 'tributary' status of waters, and to the 'adjacent' status

of wetlands. In problematic situations, Districts can request case-specific guidance from Corps Headquarters Regulatory Branch.

The Appellant contends that the Supreme Court in its decision in *SWANCC*, modified its previous holding in the *Riverside Bayview Homes* decision. In the Appellant's view, after *SWANCC*, the Corps must find that there is a significant nexus between a jurisdictional water of the United Stated and the adjacent wetland in order for the Corps to assert jurisdiction under the Clean Water Act. Based on my review of these decisions and the guidance by our Headquarters, I conclude that the standard for determining adjacency has not been modified. Moreover, to the extent that Appellant relied on the Circuit Court's 1997 *Banks* opinion to provide further interpretation of the *SWANCC* decision, that reliance is misplaced because that decision predated *SWANCC*.

The District discussed its reasons for determining that the on-site wetlands were within Corps jurisdiction as adjacent wetlands as follows in its May 8, 2001, letter:

> "Based upon the information provided and our knowledge of the area, we have determined that all wetlands on site are adjacent to a tidal flood control channel. This channel is located within 250 feet of the site's western and southern boundaries. Separation of these wetlands from the channel, by man-made barriers does not extinguish adjacency. . . . Furthermore, the site's topography indicates that the water in the wetlands would flow into the channel in storm events, if not for the man made barriers."

The District letter provided two reasons for its conclusion that these areas were within reasonable proximity of waters of the United States. The first of these reasons was that the wetlands on the project site were within 250 feet of the jurisdictional ACFCD channels. The District did not provide any informa-

tion on why the 250-foot distance was considered reasonable proximity for purposes of determining adjacency. The second factor the District relied on as was that if the man-made barriers were not in place, the wetlands would drain across the project site to the jurisdictional ACFCD channels during storm events.

In regard to the first factor, I conclude the District has not sufficiently documented why a 250-foot distance should be considered within reasonable proximity to establish adjacency in this situation. The District's one page document "*Additional Factors To Consider When Making "Adjacency" Determinations*", described several criteria including topographic connections, hydrologic connections, and ecologic connections which could be documented to assist in establishing adjacency. This document, although undated, is known to precede the *SWANCC* decision, and could have been used to assist the District in its determination. However, the factors described in that document were not addressed in any detail in this jurisdictional determination.

The second factor the District relied on was its determination that if the man-made barriers were not in place, the wetlands would drain across the project site to the jurisdictional ACFCD channels during storm events. The Appellant countered that conclusion with the assertion that if the man-made restrictions were removed, that drainage would increase to such an extent in the southwestern portion of the site that the wetlands would disappear due to lack of sufficient wetland hydrology. The Appellant also claims that parts of the site would not drain to San Francisco Bay whether the berms were in place or not. Furthermore, the Appellant claims that the site did not have wetlands prior to establishment of the ACFCD channel.

I regard as irrelevant both the District's and the Appellant's arguments regarding the second factor, what would happen if the berms were removed. Both positions are based on specu-

lation as to future conditions that do not now exist. The Appellant's supporting information that few, if any, wetlands occurred on this site at some point in the past 50 years is also irrelevant.

I concur with the District's conclusion that the presence of a barrier does not necessarily extinguish adjacency. However, neither does the presence of such a barrier establish adjacency. As discussed above, the Administrative Record does not provide any details why the wetlands on this site were considered adjacent other then a statement of the distance between the wetlands and the nearest jurisdictional waters.

In addition, the District did not explain how some of the smaller, separately mapped, wetland areas in the interior of the site could be considered adjacent. The Corps regulations at 33 CFR Part 328.3 (a)(7) states that waters of the United States include:

> "Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) (1)-(6) of this section [waters of the United States] [Emphasis added].

It appears that the wetlands in the center of the site are closer to other wetlands than they are to the ACFCD channels. In order for these wetlands on the interior of the site to be considered jurisdictional, they must be directly adjacent to the ACFCD channels or they must form a "wetland continuum or complex" with other wetlands on the site. In such situations the entire complex can be considered an adjacent wetland. This situation was described, for purposes of determining which jurisdictional water a wetland was adjacent to, in the Preamble to the 1991 reissuance of the Corps Nationwide Permits 56 Fed Reg page 59113, 1991, as follows:

> "In systems where there is a broad continuum of wetlands, all are considered adjacent to the major waterbody to which it is contiguous.

Although this guidance is not directly applicable to this situation as the project site wetlands are not contiguous with the ACFCD channel, it does support the approach of having a broad area of wetlands considered adjacent to a larger water body, such as the San Francisco Bay, provided that they can be considered part of a broad continuum of wetlands.

However, the only evidence that a broad continuum of wetlands existed here, was the District project manager's April 17, 2001 Memorandum To File, which stated that water collected during storms in wetlands in the center of the site would flow towards other wetlands on the site closer to the ACFCD channel. The Appellant disputes the assertion that there would be sufficient precipitation to generate flow between the wetlands in the center of the site and those on the west and south edge of the site. I find that the District's conclusion, without further documentation regarding this approach, is insufficient to establish that the wetlands on the interior of this site are part of a complex and therefore adjacent for jurisdictional purposes.

I conclude the District's jurisdictional determination is not supported by substantial evidence in the Administrative Record, and remand this action to the District as required by 33 CFR Part 331.9 for reconsideration based on the instructions below.

The District must use its existing procedures to further document, reconsider, and if appropriate, modify its jurisdictional determination that the wetland unit described by points 1a, 6a, and 7a; and the wetland unit described by point 3a, are within Corps jurisdiction as wetlands adjacent to the jurisdictional ACFCD flood control channel.

The District must also use also use its existing procedures to further document, reconsider, and if appropriate, modify its jurisdictional determination that the wetland unit described by point 2a, the wetland. unit described by point 5a, and the

undescribed wetland unit mapped approximately 25 feet north of point 5a, are within Corps jurisdiction. These wetlands are in the interior of the project site. The District must further document why these distinctly mapped wetland on the interior of the site are directly adjacent to jurisdictional waters despite the distinctly mapped, intervening wetlands, or explain why these wetlands are adjacent as part of a complex or continuum of wetlands.

If the District finds that after applying its existing procedures, that it still lacks substantial evidence upon which to reach a conclusion, the District may seek case-specific guidance from Corps Headquarters Regulatory Branch as discussed in the Chief of Operations Division May 11, 2001 Memorandum. If upon reconsideration the District has substantial evidence that some of the wetlands areas should be considered isolated wetlands rather than adjacent wetlands, then the jurisdictional status of these areas should be reconsidered pursuant to the *SWANCC* decision.

Information Received and its Disposition During the Appeal Review: In addition to the Administrative Record, the following additional clarifying information was submitted during the appeal.

1) District Project Managers September 6, 2001 supplement clarifying statement regarding relevance to the jurisdictional determination of whether tidal action would reach the site if the current berms were removed.

2) Appellant's September 14, 2001 supplemental responses to questions asked at the Administrative Appeal conference.

3) District's Office of Counsel supplemental memo of September 28, 2001 regarding determination of adjacency.

4) District's Regulatory Branch undated "Additional Factors to Consider When Making "Adjacency" Determinations" sheet, and District Office of Counsel's 1995 memorandum regarding adjacency on the Dawson property submitted October 2, 2001.

5) Appellant's October 9, 2001 additional response to the District's interpretations of adjacency.

All these submittals and information were classified as clarifying information, and were considered during the review of this administrative appeal. Several culverts with flap gates on the intervening property between the Appellant's project site and the ACFCD channel had been recently blocked. This was considered new information and provided to the District to investigate whether any enforcement action is appropriate.

Conclusion: I remand this approved jurisdictional determination to the District to reconsider and further document and/or modify its conclusions regarding which wetlands on the project site are adjacent to jurisdictional waters of the United States. In completing this reconsideration, the District will follow the specific instructions identified in this Administrative Appeal Decision.

original signed by Leonardo V. Flor, COL, EN, Dep Div Cdr for

Robert L. Davis
Colonel (P), Corps of Engineers
Division Engineer

APPENDIX D

[LOGO]

DEPARTMENT OF THE ARMY
SAN FRANCISCO DISTRICT, CORPS OF ENGINEERS
333 MARKET STREET
SAN FRANCISCO, CALIFORNIA 94105-2197

Jan. 28, 2002

Regulatory Branch (1145b)

Subject: File Number 23205S

Mr. Myron N. Crawford
Baccarat Fremont Developers LLC
10050 Bandley Drive
Cupertino, California 95014-2188

Dear Mr. Crawford:

This letter is the San Francisco District Corps of Engineers (District) response to the jurisdictional delineation appeal remand decision, made by the Corps of Engineers South Pacific Division (Division), on the Fremont-Cushing Plaza site, in the City of Fremont, Alameda County, California. In a memorandum dated October 25, 2001, the Division remanded the delineation back to the District for reconsideration.

In response to this memorandum, a reconsideration of the subject approved delineation was conducted to further document the District's conclusion that wetlands are adjacent to jurisdictional waters of the U.S. The Administrative Record was further reviewed in accordance with the Administrative Appeal decision document. For the reasons set forth below, and further explained in the attached memorandum for Record, the District has determined that the wetlands on the Fremont-Cushing Plaza site are adjacent to tidal waters under the approved jurisdictional delineation.

1. Man-made Barriers
2. Reasonable Proximity
3. Wetlands Functions
4. Assessment Area
5. 100 Year Floodplain
6. Hydric Soils

If you have any further questions about this project feel free to call Philip Shannin of our Regulatory office at 415-977-8445.

Sincerely,

/s/ Original Signed By District Engineer
TIMOTHY S. O'ROURKE
Lieutenant Colonel, Corps of Engineers
District Engineer

Enclosure

Copy Furnished w/ encl:

Wetlands Research Associates, San Rafael, CA 94901,
ATTN: Mike Josselyn

CF:
CESPD-DE
CESPD-ET-C (POMEROY)
CESPN-OR-RS (SHANNIN)
CESPN-OR-R Rdg File

Memorandum for Record

Subj: Reconsideration of Remand of Appeal Decision of Approved Jurisdictional Determination for Baccarat Fremont Developers, LLC. File No. 23205S

1. In response to the Memorandum dated 25 Oct 2001, Remand of Appeal Decision, a reconsideration of the subject approved jurisdictional determination was conducted to further document the District's conclusion that wetlands are adjacent to jurisdictional waters of the US. The Administrative Record was further reviewed in accordance with the Administrative Appeal decision document. For the reasons set forth in detail below, the District has determined that the wetlands on the Cushing-Fremont Plaza Project site are adjacent to tidal waters under the approved jurisdictional determination.

2. The following sets forth the three relevant findings of the Administrative Appeal decision and the District's responses:

> a. *In regard to the first factor, I conclude the District has not sufficiently documented why a 250-foot distance should be considered within reasonable proximity to establish adjacency in this situation.*

The District asserts that the wetlands are adjacent for the reasons set forth below:

> (i) Man-Made Barriers such as berms and air bladders do not defeat adjacency. The term adjacent is defined in the Corps regulations at 33 CFR 328.3(c) as ". . . . Wetlands separated from other waters other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are adjacent wetlands." Wetland parcels 1, 2, 5, 6 and 7 and the S end of the parcel are separated from the Alameda County Flood Control District (ACFCD) tidal channel by a 5 foot wide

berm at the fenceline, a 30 foot wide excavation and a 30 footlwide levee road. These are all man-made barriers that separate the wetland complex from other waters. The edge of this wetland complex is approximately 65 to 70 feet from the tidal waters.

Wetland parcels 1, 2, 5, 6 and 7 are or were contiguous with a surface drainage ditch that discharged through a set of culverts with tides gates to the ACFCD channel. The culverts have recently been blocked by inflated air bladder dams. According to topographic maps supplied by the applicant, this feature hydrologically connected the wetlands to the tidal channel, but man-made barriers have obstructed the hydrologic connection.

(ii) Reasonable Proximity. A reasonable physical distance to establish adjacency between a wetland and a tributary has never been defined for jurisdictional purposes. However, it is recognized by the courts that adjacency includes the concept of reasonable proximity. Reasonable proximity is dependent on the habitat and hydrologic systems under consideration. For example, in large habitat systems such as estuarine waters, integrated wetland functions can occur even though there are large intervening distances between the wetlands and the tributaries. The District has historically considered wetlands within and along the historic bay margins as adjacent. In the present case, the edge of the historic bay was contiguous with the subject wetlands. As a general rule, the intersection of marine, estuarine and palustrine systems greatly increase the probability of the occurrence or potential for wetland functions.

In addition, the District has made numerous jurisdictional determinations on the basis of reasonable proximity in the immediate vicinity of the subject project site (e.g., Catellus, Lyons, Weber, Ardenwood and Union

Sanitation) that are consistent with the present determination.

(iii) Wetlands Functions. The wetlands on this parcel constitute the closest palustrine (nontidal) wetland systems upslope from the neighboring estarine and marine waters. Estuaries are unique in that rivers meet the sea and freshwater mixes with saltwater. Due to their location, the wetlands contribute or have the potential to contribute to important water quality renovative functions. In addition, they function as ecotone transitions, diverse habitat niches and refuge areas for migrant or local shorebirds and waterfowl.

The Administrative Record includes a list of important wetland functions proposed by the applicant's consultant that include wildlife habitat, groundwater recharge or discharge, floodflow alteration, nutrient removal/ transformation, aquatic diversity/abundance, sediment stabilization, sediment/toxicant retention, and recreational opportunities. By performing these functions the subject wetlands contribute to the improved quality of the aquatic environment in general and the tidal waters in the immediate vicinity in particular.

The Administrative Record clearly documents the fact that wetland functions occurring within the subject wetlands are contributing to the maintenance and/or enhancement of the aquatic environment and are, therefore, adjacent wetlands.

(iv) Assessment Area. Due to the large reduction in the number of wetlands in the San Francisco Bay area, functions occurring in remaining wetlands such as the subject area are considerably more valuable to the maintenance and enhancement of the aquatic environment. The Bay Area Wetlands Ecosystem Goals Project (1999) states that restoration of the Warm Springs area (i.e., the

Fremont-Cushing Plaza Area) would have unique benefits, including the increase of rare plant species populations by enhancing the tidal/moist grassland transition zone and vernal pools. The subject wetlands include such vernal pools and moist wetlands.

Thus, the wetland functions of the subject wetlands are remnants of cumulatively important ecological areas and as such are integrated with biologic and physical functions in neighboring tributaries and play a key role in the quality of the habitat of these waters.

(v) 100 Year Floodplain. Prior to the Supreme Court decision *Solid Waste Agency of Northern Cook County v. United States*, 531 U.S. 159 (January 9, 2001) ("SWANCC"), the District considered wetlands that are situated within the 100 year floodplain of a jurisdictional waterbody as being adjacent to that waterbody. See *Additional Factors To Consider When Making "Adjacency" Determinations*, paragraph 4(a). For the following reasons, the District believes that the subject wetlands are within the 100 year floodplain:

(1) A report from the City of Fremont states that "the site is within an area subject to inundation by a 100 year floodplain.

(2) A Federal Emergency Management Agency (FEMA) map depicts all of the wetlands on the project site to be within the 100 year floodplain.

In addressing fills within the 100 year floodplain, General Condition #26 of the Nationwide Permit program, recognizes the importance of integrated hydrologic functions that occur between wetlands and waterbodies located within this current zone.

(vi) Hydric Soils. The Alameda County Soil Survey identifies a hydric soil unit occurring over much of the

project site. This soil unit occurs where most of the subject wetlands are located, and the hydric soil unit is contiguous with the area covered by tidal waters and an adjacent salt evaporater.

Vegetation transects supplied by the applicant's consultant on this project, indicate that extant plants are adapted to saline and alkaline soils. Even though recent activities on the site have disturbed the soils on and adjacent to the project boundary, the fact that the hydric soil unit extends to the tidal waters is evidence that it is contiguous to a jurisdictional waterbody.

b. *The second factor the District relied on was its determination that if the man-made barriers were not in place, the wetlands would drain across the project site to the jurisdictional ACFCD channels during storm events.*

I regard as irrelevant both the District's and the Appellant's arguments regarding the second factor, what would happen if the berms were removed. Both positions are based on speculations as to future conditions that do not now exist.

The District is in accord with the Division's determination on this issue.

c. *In addition, the District did not explain how some of the smaller, separately mapped, wetland areas in the interior of the site could be considered adjacent. In order for these wetlands on the interior of the site to be considered jurisdictional, they must be directly adjacent to the ACFCD channels or they must form a "wetland continuum or complex" with other wetlands on the site.*

The District considers the wetlands on the property to be a complex or continuum. This is based upon site observations during the initial field verification. At that time Dan Martel observed, to the best of his recollection, that wetland areas 1,

2, 5, 6 and 7 were hydrologically connected through surface flow, according to the topographic maps supplied by the applicant, and would have been hydrologically connected to tidal waters through a surface drainage ditch and two culverts with flap gates.

3. This decision serves as the Corns Final Decision under 33 CFR 331.10.

APPENDIX E

[LOGO]

DEPARTMENT OF THE ARMY
SAN FRANCISCO DISTRICT, CORPS OF ENGINEERS
333 MARKET STREET
SAN FRANCISCO, CALIFORNIA 94105-2197

May 8, 2001

Regulatory Branch (1145b)

Subject: File Number 23205S

Mr. Carl Berg
Baccarat Fremont Developers LLC
10050 Bandley Drive
Cupertino, California 95014-2188

Dear Mr. Berg:

Thank you for your submittal of January 9, 2001 requesting reevaluation of the extent of Corps of Engineers jurisdiction at the Fremont Cushing Plaza site, located at the southwest corner of the intersection of Cushing Parkway and Fremont Boulevard, in the City of Fremont, Alameda County, California. This area was last reviewed in January 1998, as documented in our letter dated February 17, 1998.

We have reexamined our previous jurisdictional determination, in light of recent case law. The U.S. Supreme Court decision recently invalidated the Corps authority to take jurisdiction over wetlands, solely on the use of migratory bird use. However, the Court did not eliminate the Corps authority to regulate wetlands adjacent to a tidal waterway.

Based upon the information provided and our knowledge of the area, we have determined that all wetlands on site are adjacent to a tidal flood control channel. This channel is located within 250 feet of the site's western and southern

boundaries. Separation of these wetlands from the channel, by man made barriers does not extinguish adjacency. According to 33 CFR 328.3(c), "Wetlands separated from other waters of the U.S. by man-made dikes or barriers, natural river berms, beach dunes, and the like are adjacent." Furthermore, the site's topography indicates that the water in the wetlands would flow into the channel in storm events, if not for the man-made barriers. Therefore, the Corps will continue to assert jurisdiction, based on the map provided with our February 17, 1998 letter.

One wetland on site, receives tidal flow from the flood control channel, and is subject to Corps jurisdiction under Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 403). All proposed work in this wetland, must be authorized by the Corps of Engineers pursuant to Section 10 of the Rivers and Harbors Act.

All proposed discharges of dredged or fill material into waters of the United States must be authorized by the Corps of Engineers pursuant to Section 404 of the Clean Water Act (CWA) (33 U.S.C. 1344). Waters of the United States generally include tidal waters, lakes, ponds, rivers, streams (including intermittent streams), and wetlands.

You are advised that the Corps has established an Administrative Appeal Process, as described in 33 CFR Part 331 (65 FR 16,486; Mar. 28, 2000), and outlined in the enclosed flowchart and "Notification of Administrative Appeal Options, Process, and Request for Appeal" form (NAO-RFA). If you do not intend to accept the approved jurisdictional determination, you may elect to provide new information to the District Engineer for reconsideration or submit a completed NAO-RFA form to the Division Engineer to initiate the appeal process. You will relinquish all rights to appeal, unless new information or a completed NAO-RFA form is received by the Corps within sixty (60) days of the date of the NAO-RFA.

If you have any questions, please call Philip Shannin of our Regulatory Branch at telephone 415-977-8445. All correspondence should reference the file number at the head of this letter.

Sincerely,

Original Signed By Calvin C. Fong
Calvin C. Fong
Chief, Regulatory Branch

Enclosure

CF:

CESPN-OR-RS
CESPN-OR-R Rdg File

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed NOV 23, 2005]

No. 03-16586
D.C. No. CV-02-03317-CW
Northern District of California, Oakland

BACCARAT FREMONT DEVELOPERS, LLC,
a California limited liability company,
Plaintiff-Appellant,

v.

UNITED STATES ARMY CORPS OF ENGINEERS; TIMOTHY A. O'ROURKE; SAN FRANCISCO STATES ARMY CORPS OF ENGINEERS; STATE WATER RESOURCES CONTROL BOARD; CELESTE CANTU, Executive Officer of State Water Resources Control Board; SAN FRANCISCO REGIONAL WATER QUALITY CONTROL BOARD; LORETTA K. BARSAMIAN, Executive Officer of San Francisco Regional Water Quality Control Board; CITY OF FREMONT,
Defendants-Appellees.

ORDER

Before: W. FLETCHER, *Circuit Judge*.

Appellant's motion for an extension of time within which to file a petition for rehearing is hereby GRANTED. Appellant's petition for rehearing is due on or before December 5, 2005.

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed DEC 22, 2005]

No. 03-16586
D.C. No. CV-02-03317-CW
Northern District of California, Oakland

BACCARAT FREMONT DEVELOPERS, LLC,
a California limited liability company,
Plaintiff-Appellant,

v.

UNITED STATES ARMY CORPS OF ENGINEERS; TIMOTHY A. O'ROURKE; SAN FRANCISCO DISTRICT OF UNITED STATES ARMY CORPS OF ENGINEERS; STATE WATER RESOURCES CONTROL BOARD; CELESTE CANTU, Executive Officer of State Water Resources Control Board; SAN FRANCISCO REGIONAL WATER QUALITY CONTROL BOARD; LORETTA K. BARSAMIAN, Executive Officer of San Francisco Regional Water Quality Control Board; CITY OF FREMONT,
Defendants-Appellees.

ORDER

Before: D.W. NELSON, W. FLETCHER, and FISHER, *Circuit Judges*.

Plaintiff-Appellant's petition for rehearing and for rehearing en banc, received December 5, 2005, is ordered filed.

Plaintiff-Appellant's motion for leave to file additional documents, filed December 8, 2005, is hereby granted.

Ruling on Plaintiff-Appellant's petition for rehearing with petition for rehearing en banc is deferred pending the United

States Supreme Court's final decision in *Carabell v. United States Army Corps of Engineers*, 391 F.3d 704 (6th Cir. 2004), *cert. granted*, 126 S. Ct. 415 (2005).

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed AUG. 3, 2006]

No. 03-16586
D.C. No. CV-02-03317-CW
Northern District of California, Oakland

BACCARAT FREMONT DEVELOPERS, LLC,
a California limited liability company,
Plaintiff-Appellant,

v.

UNITED STATES ARMY CORPS OF ENGINEERS; TIMOTHY A. O'ROURKE; SAN FRANCISCO DISTRICT OF UNITED STATES ARMY CORPS OF ENGINEERS; STATE WATER RESOURCES CONTROL BOARD; CELESTE CANTU, Executive Officer of State Water Resources Control Board; SAN FRANCISCO REGIONAL WATER QUALITY CONTROL BOARD; LORETTA K. BARSAMIAN, Executive Officer of San Francisco Regional Water Quality Control Board; CITY OF FREMONT,
Defendants-Appellees.

ORDER

Before: D.W. NELSON, W. FLETCHER, and FISHER, *Circuit Judges*.

The panel has voted to deny the petition for rehearing. Judges Fletcher and Fisher have voted to deny the petition for rehearing en banc; and Judge Nelson so recommends.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc, filed December 22, 2005, are DENIED.

APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed AUG. 17, 2006]

No. 03-16586
D.C. No. CV-02-03317-CW
Northern District of California, Oakland

BACCARAT FREMONT DEVELOPERS, LLC,
a California limited liability company,
Plaintiff-Appellant,

v.

UNITED STATES ARMY CORPS OF ENGINEERS; TIMOTHY A. O'ROURKE; SAN FRANCISCO DISTRICT OF UNITED STATES ARMY CORPS OF ENGINEERS; STATE WATER RESOURCES CONTROL BOARD; CELESTE CANTU, Executive Officer of State Water Resources Control Board; SAN FRANCISCO REGIONAL WATER QUALITY CONTROL BOARD; LORETTA K. BARSAMIAN, Executive Officer of San Francisco Regional Water Quality Control Board; CITY OF FREMONT,
Defendants-Appellees.

ORDER

Before: D.W. NELSON, W. FLETCHER, and FISHER, *Circuit Judges*.

Appellant's motion for stay of mandate is hereby DENIED.

(3)

No. 06-619

In the Supreme Court of the United States

BACCARAT FREMONT DEVELOPERS, LLC, PETITIONER

v.

UNITED STATES ARMY CORPS OF ENGINEERS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
SUE ELLEN WOOLDRIDGE
Assistant Attorney General
ELLEN DURKEE
KATHERINE W. HAZARD
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the wetlands at issue in this case are "waters of the United States" within the meaning of the Clean Water Act, 33 U.S.C. 1362(7).

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In the Supreme Court of the United States

No. 06-619

BACCARAT FREMONT DEVELOPERS, LLC, PETITIONER

v.

UNITED STATES ARMY CORPS OF ENGINEERS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 425 F.3d 1150. The opinion of the district court (Pet. App. 15a-24a) is reported at 327 F. Supp. 2d 1121.

JURISDICTION

The judgment of the court of appeals was entered on October 14, 2005. A petition for rehearing was denied on August 3, 2006 (Pet. App. 51a-52a). The petition for a writ of certiorari was filed on November 1, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves the permitting requirements of the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, as amended, Pub. L. No. 95-217, 91 Stat. 1566, 33 U.S.C. 1251 *et seq.* (Clean Water Act or CWA). Pursuant to Section 404(a) of the CWA, 33 U.S.C. 1344(a), petitioner sought a permit from the United States Army Corps of Engineers (Corps) to place fill material into 2.36 acres of wetlands in Alameda County, California. Pet. App. 17a, 37a. After determining that the relevant wetlands are subject to its regulatory jurisdiction, the Corps issued a permit that allows petitioner to fill the 2.36 acres but requires certain mitigation conditions to offset the loss of those wetlands. *Id.* at 4a. Petitioner filed suit, contending that the wetlands on the site are not "waters of the United States" within the meaning of the CWA, 33 U.S.C. 1362(7), and that the Corps therefore acted arbitrarily or capriciously by requiring mitigation measures. Pet. App. 4a-5a. The district court granted summary judgment to the Corps, *id.* at 15a-24a, and the court of appeals affirmed. *Id.* at 1a-13a.

1. Congress enacted the CWA "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). Section 301(a) of the CWA prohibits the "discharge of any pollutant by any person" except in compliance with the Act. 33 U.S.C. 1311(a). The term "discharge of a pollutant" is defined to mean "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. 1362(12)(A). The CWA defines the term "navigable waters" to mean "the waters of the United States, including the territorial seas." 33 U.S.C. 1362(7).

The Corps and the United States Environmental Protection Agency (EPA) share responsibility for implementing and enforcing Section 404 of the CWA, 33 U.S.C. 1344, which authorizes the issuance of permits for the discharge of dredged or fill material into waters covered by the Act. See, *e.g.*, 33 U.S.C. 1344(a)-(c). The Corps and EPA have promulgated substantively equivalent regulatory definitions of the term "waters of the United States." See 33 C.F.R. 328.3(a) (Corps definition); 40 C.F.R. 230.3(s) (EPA definition). That definition encompasses, inter alia, waters susceptible to use in interstate commerce, including tidal waters, see 33 C.F.R. 328.3(a)(1), 40 C.F.R. 230.3(s)(1); "[t]ributaries" of such waters, see 33 C.F.R. 328.3(a)(5), 40 C.F.R. 230.3(s)(5); and wetlands that are "adjacent" to other covered waters, see 33 C.F.R. 328.3(a)(7), 40 C.F.R. 230.3(s)(7).[1] The regulations define the term "adjacent" to mean "bordering, contiguous, or neighboring," and they provide that "[w]etlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent wetlands.'" 33 C.F.R. 328.3(c).

The Corps has also promulgated regulations governing the Section 404 permit-application process. 33 C.F.R. Pts. 320, 323, 325. Under those regulations, "[t]he Corps has authorized its district engineers to issue formal determinations concerning the applicability of the [CWA] * * * to activities or tracts of land." 33

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[1] To avoid confusion between the term "navigable waters" as defined in the CWA and implementing regulations, see 33 U.S.C. 1362(7) and 33 C.F.R. 328.3, and the use of the term "navigable waters" to describe waters that are, have been, or could be used for interstate or foreign commerce, see 33 C.F.R. 328.3(a)(1), this brief will refer to the latter as "traditional navigable waters."

C.F.R. 320.1(a)(6); see 33 C.F.R. 325.9. Thus, before any discharge of dredged or fill material has occurred, a private landowner may request that the Corps issue a jurisdictional determination so that the landowner can ascertain whether activities at a particular site would require a federal permit.

2. This Court has recognized that Congress, in enacting the CWA, "evidently intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985) (*Riverside Bayview*); see *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 486 n.6 (1987) ("While the Act purports to regulate only 'navigable waters,' this term has been construed expansively to cover waters that are not navigable in the traditional sense."). In *Solid Waste Agency of Northern Cook County* v. *United States Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*), the Court held that use of "isolated" nonnavigable intrastate waters by migratory birds was not by itself a sufficient basis for the exercise of federal regulatory jurisdiction under the CWA. *Id.* at 166-174. The Court noted, and did not cast doubt upon, its prior holding in *Riverside Bayview* that the CWA's coverage extends beyond waters that are "navigable" in the traditional sense. See *id.* at 172.

Most recently, the Court again construed the CWA term "waters of the United States" in *Rapanos* v. *United States*, 126 S. Ct. 2208 (2006). *Rapanos* involved two consolidated cases—*Rapanos* v. *United States*, No. 04-1034, and *Carabell* v. *United States Army Corps of*

Engineers, No. 04-1384—in which the CWA had been applied to pollutant discharges into wetlands adjacent to nonnavigable tributaries of traditional navigable waters. *Ibid.*; see *id.* at 2219 (plurality opinion). All Members of the Court agreed that the term "waters of the United States" encompasses some waters that are not navigable in the traditional sense. See *id.* at 2220 (plurality opinion); *id.* at 2241 (Kennedy, J., concurring in the judgment); *id.* at 2255 (Stevens, J., dissenting).

Four Justices in *Rapanos* interpreted the term "waters of the United States" as covering "relatively permanent, standing or continuously flowing bodies of water," 126 S. Ct. at 2225 (plurality opinion), that are connected to traditional navigable waters, *id.* at 2226-2227, as well as wetlands with a continuous surface connection to such water bodies, *id.* at 2227.[2] Justice Kennedy interpreted the term to encompass wetlands that "possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made." *Id.* at 2236 (Kennedy, J., concurring); see *id.* at 2248. In addition, Justice Kennedy concluded that the Corps' assertion of jurisdiction over "wetlands adjacent to navigable-in-fact waters" may be sustained "by showing adjacency alone." *Ibid.* The four dissenting Justices, who would have affirmed the court of appeals' application of the pertinent regulatory provisions, also concluded that the term "waters of the United States" encompasses, inter alia, all tributaries and wetlands that satisfy either the plural-

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[2] The *Rapanos* plurality noted that its reference to "relatively permanent" waters "d[id] not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought," or "*seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months." 126 S. Ct. at 2221 n.5.

ity's standard or that of Justice Kennedy. See *id.* at 2265 & n.14 (Stevens, J., dissenting).

3. In 1997, petitioner purchased a 30.98-acre site in Fremont, California, near San Francisco Bay, on which it planned to develop an office complex. The site is roughly rectangular in shape and is bordered on the south and west by property owned by the Alameda County Flood Control District (ACFCD). Two ACFCD flood control channels, which rise and fall with the tide and connect to San Francisco Bay, run parallel to the southern and western boundaries of the site. Pet. App. 2a-4a, 16a-17a, 24a, 28a.

The relevant site contains 7.66 acres of wetlands. Pet. App. 2a. Petitioners acknowledge that 0.48 acres of the site are tidally inundated through a leaking flap gate in a culvert and therefore are "waters of the United States" within the meaning of the CWA. See Pet. 7 n.3; Pet. App. 15a n.1, 16a. Between the wetlands and the flood control channels is a man-made berm topped by a maintenance road, which parallels the southern and western boundaries of the site. *Id.* at 2a-3a, 16a. At the closest point, the edge of the wetlands is approximately 65-70 feet from the tidal waters. *Id.* at 3a, 40a. Two culverts that pass through the berm connect the wetlands hydrologically to the western channel. *Id.* at 43a-44a.

4. At petitioner's request, the Corps' San Francisco District conducted a jurisdictional determination pursuant to 33 C.F.R. 320.1(a)(6) and 325.9.[3] On January 28,

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[3] In February 1998, the San Francisco District initially determined that 7.66 acres of wetlands on the site were covered by the CWA as wetlands adjacent to traditional navigable waters, see 33 C.F.R. 328.3(a)(1), (7) and (c). See Pet. App. 3a. After this Court issued its decision in *SWANCC*, petitioner requested that the Corps reconsider

2002, the San Francisco District issued a jurisdictional determination, concluding that 7.66 acres of wetlands on the site are adjacent to tidal waters and thus subject to the Corps' jurisdiction under the CWA. Pet. App. 3a-4a, 37a-44a. The District determined that the wetlands located on the site occur in approximately six delineated areas that together form "a complex or continuum" connected by hydrology and hydric soils. *Id.* at 43a-44a.[4]

In 1998, shortly after its initial request for a jurisdictional determination, petitioner applied for a permit to fill 2.36 of the 7.66 acres of wetlands on the site. Pet. App. 3a, 17a. On February 6, 2002, the Corps offered to issue a permit that would authorize petitioner to discharge fill material into those 2.36 acres. *Id.* at 4a. As a condition of the permit, however, the Corps required

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its jurisdictional determination. *Ibid.* The San Francisco District concluded that *SWANCC* did not affect its authority over "wetlands adjacent to a tidal waterway." *Ibid.* On appeal, the Corps' South Pacific Division remanded the matter to the San Francisco District for further consideration of the question whether the wetlands are adjacent to other covered waters. *Id.* at 36a; see *id.* at 25a-36a. On January 28, 2002, in its decision on remand, the District again determined that 7.66 acres of wetlands on the site form one wetlands complex adjacent to the tidal flood control channels and therefore are within the Corps' jurisdiction under the CWA. *Id.* at 37a-44a.

[4] The District set forth six reasons for its determination that the wetlands are adjacent to tidal waters: (1) barriers such as berms and culvert flaps do not defeat adjacency pursuant to 33 C.F.R. 328.3(c); (2) the wetlands are in reasonable proximity to the flood control channels; (3) the wetlands serve important functions that contribute to the aquatic environment in general and to the nearby tidal waters; (4) the wetlands' functions are particularly important given the reduction of wetlands in the San Francisco Bay area; (5) the wetlands are within the 100-year flood plain of tidal waters; and (6) the wetlands are part of a hydric soil unit that is contiguous with adjacent tidal waters. Pet. App. 4a, 39a-43a.

petitioner to "create on-site a minimum of 2.36 acres of seasonal freshwater wetlands" and to "enhance the remaining 5.3 acres of existing brackish wetlands." *Ibid.* Petitioner signed the permit but reserved the right to seek judicial review of the Corps' jurisdictional determination. *Ibid.*

5. Petitioner filed suit, seeking (1) a declaration that the Corps does not have regulatory jurisdiction over the disputed wetlands and (2) an injunction prohibiting the Corps from enforcing the mitigation conditions of the permit. See Pet. App. 18a. The district court granted the Corps' motion for summary judgment. *Id.* at 15a-24a. The court explained that it was "undisputed that the flood control channels to the west and south of the site are waters of the United States subject to Clean Water Act § 404 jurisdiction." *Id.* at 22a. The court concluded that "the contested wetlands are separated from the channels by the berms, which are man-made barriers, and the contested wetlands are therefore 'adjacent wetlands,' under the meaning of 33 C.F.R. § 328.3(c), over which the Corps has regulatory jurisdiction." *Ibid.*

6. The court of appeals affirmed. Pet. App. 1a-13a.

a. The court of appeals observed that the ACFCD flood control channels were acknowledged by both parties to "contain waters of the United States." Pet. App. 7a. The court further explained that the Corps had found the relevant wetlands to be "adjacent to the flood control channels" for purposes of 33 C.F.R. 328.3(a)(7). The court rejected petitioner's contention that "adjacency alone is insufficient to support the Corps' jurisdiction." Pet. App. 7a. The court stated that "[t]he text of the CWA and the implementing regulations promulgated by the Corps give no indication that a significant hydrological or ecological connection is a condition of

Corps jurisdiction over adjacent wetlands." *Ibid.*; see *id.* at 7a-12a.

In the alternative, the court of appeals held that, "even if the CWA did require demonstration of a significant nexus on a case-by-case basis * * *, there is no question that one exists here." Pet. App. 13a. The court relied on the Corps' findings as to the relationship between the wetlands and the ACFCD flood control channels, including the findings that "the wetlands serve important functions that contribute to the aquatic environment in general and to the nearby tidal waters in particular," and that "the wetlands' functions are particularly important given the reduction of wetlands in the San Francisco Bay area." *Ibid.* The court stated that, "[e]ven viewing the evidence in the light most favorable to [petitioner]," the agency's findings could not be set aside as arbitrary or capricious. *Ibid.* The court concluded that, "[t]aken together, the Corps' findings would be more than sufficient to establish a significant nexus between the wetlands on the site and the flood control channels, were such a showing required." *Ibid.*

c. The court of appeals issued its decision on October 14, 2005. See Pet. App. 1a. Petitioner filed a petition for rehearing and rehearing en banc. The court of appeals deferred ruling on that petition pending this Court's resolution of *Carabell*. See *id.* at 49a-50a. After this Court issued its decision in *Rapanos* and *Carabell*, the court of appeals denied the petition for rehearing and rehearing en banc. *Id.* at 51a-52a.

ARGUMENT

Petitioner contends (Pet. 13-21) that the judgment of the court of appeals should be vacated and the case should be remanded for reconsideration in light of

Rapanos. That disposition is unwarranted. The Ninth Circuit's opinion makes clear that application of the standards endorsed by a majority of this Court in *Rapanos* would not alter the outcome here. Indeed, because the court of appeals explicitly deferred ruling on petitioner's request for rehearing pending this Court's resolution of *Carabell*, the court has already considered whether the decision in *Rapanos* affects the appropriate disposition of this case. The petition for a writ of certiorari therefore should be denied.

1. Under the Corps' regulations implementing the CWA, the term "waters of the United States" is defined to include all wetlands "adjacent to" other covered waters. 33 C.F.R. 328.3(a)(7). The term "adjacent" is defined to mean "bordering, contiguous, or neighboring." 33 C.F.R. 328.3(c). The regulations specifically provide that "[w]etlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent wetlands,'" *ibid.*, and a finding of adjacency does not depend under the regulations on a showing of a hydrological connection between a wetland and another covered water.

In a ruling issued before this Court's decision in *Rapanos*, the court of appeals in this case sustained the categorical approach to adjacent wetlands reflected in the Corps' regulations. See Pet. App. 6a-12a. In *Rapanos*, however, five Members of this Court concluded that the pertinent regulatory provisions are overbroad insofar as they define the term "waters of the United States" to encompass *all* wetlands adjacent to other covered waters. See 126 S. Ct. at 2227 (plurality opinion) (concluding that a wetland is covered by the CWA only if it has a "continuous surface connection with" another

covered water); *id.* at 2248-2249 (Kennedy, J., concurring in the judgment) (concluding that a wetland adjacent to a non-navigable tributary is covered only if it has a "significant nexus" to navigable-in-fact waters). When a particular wetland satisfies neither the plurality's standard nor that of Justice Kennedy, it falls outside the CWA's coverage under the approaches taken by a majority of this Court, even if it is encompassed by the regulatory definition of "waters of the United States." To the extent that the court of appeals found the regulatory provisions governing adjacent wetlands to be valid in *all* their applications, its ruling has been superseded by this Court's decision in *Rapanos*.

2. Under a proper understanding of *Rapanos*, the Corps may continue to exercise regulatory jurisdiction over any wetland that satisfies *either* the standard for CWA coverage adopted by the *Rapanos* plurality *or* the standard set forth in Justice Kennedy's concurrence. That is so because the four dissenting Justices in *Rapanos* stated explicitly that they would sustain the exercise of federal regulatory jurisdiction under the CWA whenever either of those standards is satisfied. See 126 S. Ct. at 2265 & n.14 (Stevens, J., dissenting). Thus, in all such cases, the Corps' exercise of regulatory jurisdiction would be consistent with the views of a majority of this Court's Members.

In *Marks* v. *United States*, 430 U.S. 188 (1977), this Court stated that, "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as the position taken by those Members who concurred in the judgments on the narrowest grounds." *Id.* at 193 (citation and internal quotation marks omitted). Taken in isolation, the *Marks*

Court's reference to "those Members who concurred in the judgments" might suggest that lower courts, in determining the precedential effect of a fractured decision of this Court, should ignore the views of dissenting Justices. This Court has subsequently recognized, however, that in some cases the *Marks* test is "more easily stated than applied to the various opinions supporting the result," *Grutter* v. *Bollinger*, 539 U.S. 306, 325 (2003) (quoting *Nichols* v. *United States*, 511 U.S. 738, 745 (1994)), and has acknowledged that "[i]t does not seem 'useful to pursue the *Marks* inquiry to the utmost logical possibility'" in every case, *ibid.* (quoting *Nichols*, 511 U.S. at 745-746).

In some fractured decisions, the narrowest rationale adopted by one or more Justices who concur in the judgment may be the only controlling principle on which a majority of the Court's Members agree. In that situation, application of the rule announced in *Marks* provides a sensible approach to determining the controlling legal principles of the case. But in *Rapanos*, as in some other instances, no opinion for the Court exists and neither the plurality nor the concurring opinion is in any sense a "lesser-included" version of the other.[5]

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[5] Five Justices agreed that the judgments of the Sixth Circuit in *Rapanos* and *Carabell* should be vacated and the cases remanded for further proceedings. See 126 S. Ct. at 2235 (plurality opinion); *id.* at 2252 (Kennedy, J., concurring in the judgment). The plurality concluded that a remand was necessary because the court of appeals had not determined, and the existing record provided an inadequate basis for deciding, whether the tributaries at issue "contain[ed] a relatively permanent flow" or whether the pertinent wetlands "possess[ed] a continuous surface connection" to those tributaries. *Id.* at 2235. Justice Kennedy found a remand to be appropriate because neither the Corps nor the lower courts in the consolidated cases had addressed the question "whether the specific wetlands at issue possess a significant

In that instance, the principles on which a majority of the Court agreed may be illuminated only by consideration of the dissenting Justices' views. The dissenting opinions, by emphasizing controlling legal principles on which a majority of the Court agrees, may thereby contribute to an understanding of the law created by the case. And once those principles have been identified, sound legal and practical reasons justify a rule that a lower federal court should adhere to the view of the law that a majority of this Court has unambiguously embraced. See *Waters* v. *Churchill*, 511 U.S. 661, 685 (1994) (Souter, J., concurring) (analyzing the points of agreement between plurality, concurring, and dissenting opinions to identify the legal "test * * * that lower courts should apply," under *Marks*, as the holding of the Court); cf. *League of United Latin Am. Citizens* v. *Perry*, 126 S. Ct. 2594, 2607 (2006) (analyzing concurring and dissenting opinions in a prior case to identify a legal conclusion of a majority of the Court); *Alexander* v. *Sandoval*, 532 U.S. 275, 281-282 (2001) (same); *Wilton* v. *Seven Falls Co.*, 515 U.S. 277, 285 (1995) (same); *United States* v. *Johnson*, 467 F.3d 56, 66 (1st Cir. 2006) (concluding that the federal government can establish jurisdiction over waters that "meet either the plurality's or Justice Kennedy's standard as laid out in *Rapanos*").

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nexus with [traditional] navigable waters." *Id.* at 2252; see *id.* at 2250-2252. Neither of those grounds for decision is inherently narrower than the other, thus making it logically impossible to identify a consensus narrowest position among the views of the Justices who concurred in the judgment. Both the standard articulated in the plurality opinion and that articulated in Justice Kennedy's concurrence are subsets of the dissent's standard, which would recognize as within the scope of the Corps' CWA jurisdiction all wetlands adjacent to tributaries of traditional navigable waters.

Consideration of the dissenting Justices' views is consistent with the underlying purpose of the specific rule announced in *Marks*, because it enables lower courts to discern the governing rule of law that emerges from a fractured decision of the Court. Cf. *Rapanos*, 126 S. Ct. at 2236 (Roberts, C.J., concurring) (noting the need to look to *Marks* in view of the absence of an opinion commanding a majority of the Court). And the application of that approach here clearly supports finding the existence of federal regulatory jurisdiction whenever the legal standard of the plurality or of Justice Kennedy's concurrence is satisfied, since a majority of the Court's Members would find jurisdiction in either of those instances. See *id.* at 2265 (Stevens, J., dissenting).

3. In the instant case, the Corps and the court of appeals recognized, and petitioner has not disputed, that the ACFCD flood control channels are "tidal waters"—*i.e.*, waters subject to the ebb and flow of the tide. See, *e.g.*, Pet. App. 3a, 4a, 40a; 33 C.F.R. 328.3(f). The water in the flood control channels therefore is *part of* the traditional navigable waters that extend to and include San Francisco Bay, the limit of which is defined by the high tide line. See 33 C.F.R. 328.3(a)(1) (defining the term "waters of the United States" to include "[a]ll waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, *including all waters which are subject to the ebb and flow of the tide*") (emphasis added); see also 33 C.F.R. 328.2, 328.3(d), 328.4(b)(1); 61 Fed. Reg. 65,898 (1996). The Corps' regulatory approach is consistent with the text of the CWA, see 33 U.S.C. 1344(g)(1), and with established understandings of the scope of federal regulatory authority under Section 10 of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. 403;

see 33 C.F.R. 329.4, and of the federal navigation servitude. See, *e.g.*, *Willink* v. *United States*, 240 U.S. 572, 580 (1916); see also, *e.g.*, *In re Paradise Holdings, Inc.*, 795 F.2d 756, 759 (9th Cir.) (explaining that "[t]hroughout the nation's history, tidal waters have been held to be within the definition of 'navigable waters'"), cert. denied, 479 U.S. 1008 (1986).[6]

Because the ACFCD flood control channels are traditional navigable waters, the adjacent wetlands are subject to federal regulatory jurisdiction under the analysis set forth in Justice Kennedy's *Rapanos* concurrence. That is so for two independent reasons.

a. In his concurring opinion in *Rapanos*, Justice Kennedy stated that, "[a]s applied to wetlands adjacent to navigable-in-fact waters, the Corps' conclusive standard for jurisdiction rests upon a reasonable inference of ecologic interconnection, and the assertion of jurisdiction for those wetlands is sustainable under the Act by showing adjacency alone." 126 S. Ct. at 2248; see *id.* at 2249 ("When the Corps seeks to regulate wetlands adjacent to navigable-in-fact waters, it may rely on adjacency to establish its jurisdiction."). Justice Kennedy would have required the Corps to "establish a significant nexus on a case-by-case basis" only when the agency "seeks to regulate wetlands based on adjacency to nonnavigable tributaries." *Ibid.* Justice Kennedy further explained that, with respect to "wetlands separated from another water by a berm," the "Corps' definition of

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[6] The status of the ACFCD flood control channels as traditional navigable waters does not depend on whether the channels themselves will support navigation. Like any other navigable-in-fact waterbody, tidal waters may contain shallow portions near the edges on which navigation is infeasible. Those portions nevertheless remain part of, and are not legally distinct from, the larger navigable-in-fact waterbody.

adjacency is a reasonable one, for it may be the absence of an inter[illegible]ge of waters prior to the dredge and fill activity that makes protection of the wetlands critical to the statutory scheme." *Id.* at 2245-2246. Because the ACFCD flood control channels to which petitioner's wetlands are adjacent are part of traditional navigable waters, the Corps could properly assert regulatory jurisdiction over those wetlands based on "adjacency alone." *Id.* at 2248.

b. As an alternative ground for its decision in this case, the court of appeals stated that, "even if the CWA did require demonstration of a significant nexus on a case-by-case basis * * *, there is no question that one exists here." Pet. App. 13a. The court relied on various findings made by the Corps concerning the relevant wetlands' relationship to the ACFCD flood control channels and to the larger aquatic environment. *Ibid.* The court stated that, "[e]ven viewing the evidence in the light most favorable to [petitioner]," the Corps' findings could not appropriately be set aside as arbitrary or capricious. *Ibid.* The agency findings that were reviewed and sustained by the court of appeals reinforce the conclusion that the wetlands at issue here "are likely to play an important role in the integrity of an aquatic system comprising navigable waters as traditionally understood," 126 S. Ct. at 2249 (Kennedy, J., concurring in the judgment), and that the wetlands therefore fall within the CWA's coverage under the analysis set forth in Justice Kennedy's *Rapanos* concurrence.[7]

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[7] The Corps' administrative decision explained that, "[d]ue to their location," the wetlands at issue in this case "contribute or have the potential to contribute to important water quality renovative functions." Pet. App. 41a. The Corps identified the important functions that the wetlands help perform, including floodflow alteration, nutrient removal/

4. Vacatur of the court of appeals' judgment is particularly unwarranted because that court has already had the opportunity to consider the question whether the relevant wetlands are subject to federal regulatory authority under the standards set forth in the various opinions in *Rapanos*. In December 2005, after this Court had granted the petitions for certiorari in *Rapanos* and *Carabell*, the court of appeals ordered that its ruling on petitioner's request for rehearing and rehearing en banc would be deferred pending this Court's decision in *Carabell*. Pet. App. 49a-50a. *Carabell* was decided (along with *Rapanos*) on June 19, 2006, see 126 S. Ct. at 2208, and the court of appeals denied rehearing and rehearing en banc in this case on August 3, 2006, see Pet. App. 51a-52a. Although the court of appeals did not issue an opinion explaining its denial of rehearing, it is appropriate to assume that the court, having deferred its ruling on the rehearing petition pending this Court's decision in *Carabell*, took account of that decision before allowing the Corps' jurisdictional determination to stand.

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transformation, sediment stabilization, and sediment/toxicant retention. *Ibid.* The Corps explained that "[b]y performing these functions the subject wetlands contribute to the improved quality of the aquatic environment in general and the tidal waters in the immediate vicinity in particular." *Ibid.* The Corps further explained that, in light of the wetlands' location along the historic bay margins, the "intersection of marine, estuarine and palustrine systems greatly increase[s] the probability of the occurrence or potential for wetland functions." *Id.* at 40a. The Corps noted as well that the functions performed by these wetlands are particularly important given the large reduction in the number of wetlands in the San Francisco Bay area. See *id.* at 41a-42a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 06-619

IN THE

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BACCARAT FREMONT DEVELOPERS, LLC,
Petitioner,

v.

UNITED STATES ARMY CORPS OF ENGINEERS;
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SAN FRANCISCO DISTRICT,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

In their opposition brief to the petition for a writ of certiorari, respondents submit four main arguments:

> (1) because the Court of Appeals for the Ninth Circuit deferred ruling on the petition for rehearing filed by petitioner Baccarat Fremont Developers, LLC (Baccarat) pending this Court's resolution of *Rapanos*,[1] it is self-evident that the Ninth Circuit considered this Court's

[1] As styled in the petition, this Court's resolution of the consolidated cases of *United States v. Rapanos* and *Carabell v. U.S. Army Corps of Engineers*, 126 S.Ct. 2208 (2006) is referred to herein as "*Rapanos*."

reasoning in *Rapanos* when it denied the rehearing petition (Opp. at 10, 17);

(2) the ACFCD flood control channels, by virtue of being tidally-influenced, are "navigable-in-fact" waters for purposes of finding the subject wetlands to be jurisdictional under the Clean Water Act (CWA) (Opp. at 3, 14-16);

(3) applying the rationale of *Marks v. United States,* 430 U.S. 188 (1977), CWA jurisdiction is established under *Rapanos* if either the plurality's "continuous surface connection" or Justice Kennedy's "significant nexus" test is met (Opp. at 11-14); and

(4) the Ninth Circuit's cursory recital of the Corps' adjacency "findings" constitutes sufficient judicial review as to whether a significant nexus was established in this particular case (Opp. at 16).

Baccarat replies to each of these arguments in turn.

ARGUMENT

1. The Ninth Circuit's summary denial of Baccarat's petition for rehearing cannot be read to imply that the Ninth Circuit considered the merits of the petition in light of *Rapanos*. In its petition for certiorari, Baccarat cited *United States v. Cote*, 51 F.3d 178, 181 (9th Cir. 1995) for the Ninth Circuit rule that a summary denial of a petition for rehearing does not imply any judgment on the merits. Pet. at 5, fn. 2. Respondents do not address this authority, and instead suggest, without citing any authority of their own, that one should infer that the Ninth Circuit fully considered and applied the factors set forth in the plurality opinion and Justice Kennedy's concurring opinion. Opp. at 10, 17. Respondents' inference is not warranted. Remand is therefore necessary to require the Court of Appeals to apply the *Rapanos* decision to the facts of this case.

2. In their opposition brief, respondents create a new argument that was not presented nor considered in the courts below. Respondents now argue that Justice Kennedy's exception to the significant nexus test for wetlands adjacent to navigable-in-fact waters should be applied to the wetlands at issue in this case. Opp. at 14-16. This argument is factually and legally incorrect.

It is not disputed that Justice Kennedy's exception to the significant nexus test requires an adjacent navigable-in-fact waterbody: "As applied to wetlands adjacent to navigable-in-fact waters, . . . the assertion of jurisdiction for those wetlands is sustainable under the Act by showing adjacency alone. That is the holding of *Riverside Bayview*." 126 S.Ct. at 2248. *Riverside Bayview*[2] "reserved the question of the Corps' authority over 'wetlands that are not adjacent to bodies of open water,' [citation] and in any event addressed no factual situation other than wetlands adjacent to navigable-in-fact waters. . . ." 126 S.Ct. at 2248. On these facts, Justice Kennedy determined that the *Riverside Bayview* decision compels an exception to the significant nexus test. As applied to this case, however, this exception does not even remotely qualify, notwithstanding claims by respondents to the contrary. Opp. at 15.

First, the Baccarat wetlands do not "directly abut" the ACFCD flood control channels. They are at least 65-70 feet removed from the channels, and are separated by man-made berms which prevent any form of hydrological connection between the two waterbodies.[3] Pet. App. at 3a. Unlike the

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[2] *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985).

[3] Respondents' claim that two culverts connect the wetlands hydrologically to the western ACFCD channel is absolutely incorrect. Opp. at 6. Even if the wetlands "would have been hydrologically connected" as surmised by the Corps (Pet. App. at 44a), as found by the Corps' San Francisco District and as recounted by the Ninth Circuit, there is *no* hydrological connection due to the intervening berms. Pet. App. at 3a.

facts of *Riverside Bayview*, it is not possible to wade or swim from the Baccarat wetlands to the flood control channels.[4]

Second, it has never been claimed, nor can it be on the facts of this case, that these flood control channels are "open bodies of water" or "navigable-in-fact." The channels are man-made structures operated by the County of Alameda and are designed to carry periodic urban floodwaters to the San Francisco Bay. Pet. App. at 16a.

Third, and going to the core of what respondents appear to be arguing, these nonnavigable flood control channels do not, by virtue of being tidally-influenced, assume "navigable-in-fact" attributes for purposes of applying Justice Kennedy's exception to the significant nexus test. Even though the waters in the ACFCD channels are subject to the ebb and flow of the tide and may therefore qualify as "waters of the United States" under the legal authority cited by respondents (Opp. at 14), this does not mean that they qualify as "navigable-in-fact" waters. Yet, endowing *all* waters subject to the ebb and flow of the tide with navigable-in-fact status is precisely what respondents are attempting.

Although all tidal waters are subject to the ebb and flow of the tide, *not all tidal waters are navigable-in-fact.* In discussing navigable-in-fact waters, both Justice Kennedy and the plurality opinion referenced *The Daniel Ball*, 77 U.S. 557 (1871), which found that navigable waters "are navigable-in-fact when they are used, or are susceptible of

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[4] As described in the government's briefing to the *Riverside Bayview* Court, "there is direct, unimpeded access from the mid-east boundary of Riverside's property to additional marshes and the open waters of Black Creek, a navigable water of the United States. . . . Indeed, it would not be an exaggeration to state that one could, after wading through a cattail marsh, swim directly from Riverside's property to the Great Lakes." *See* Edgar B. Washburn, *Current Status of the 404 Regulatory Program*, ALI Wetlands L. & Reg. (May/June 2001) (quoting Reply Brief for the United States at 2 (*Riverside Bayview Homes*)).

being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." *Id.* at 563. This definition from *The Daniel Ball* has expanded over the years to include waters that are now, that have been in the past,[5] or that are susceptible to use with reasonable improvements[6] by vessels in interstate or foreign commerce. The linchpin in this definition is use of the waters to transport commerce.

In contrast, waters subject to the ebb and flow of the tide necessarily embrace a larger geographic area, because commerce cannot follow everywhere the tide flows. This Court has recognized the factual distinction between navigable-in-fact waters and tidally-influenced waters. *See, e.g., Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 476 (1988) (finding that the State took title under the public trust doctrine to submerged lands that were tidally influenced, even though not navigable-in-fact); *see also, 1902 Atlantic Ltd. v. Hudson*, 574 F. Supp. 1381, 1394 (E.D.Va. 1983) ("man-made borrow pit which was not in fact navigable and at low tide is largely empty" does not qualify as "navigable waters of the United States" under the Rivers and Harbors Act of 1899).

Despite this distinction between tidal waters and navigable-in-fact waters, respondents attempt to blend the two by generically asserting that like "any other navigable-in-fact waterbody, tidal waters may contain shallow portions near the edges on which navigation is infeasible. These portions nevertheless remain part of, and are not legally distinct from, the larger navigable-in-fact waterbody." Opp. at 15, n. 6. This generic assertion does not apply to this case. The

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[5] *Economy Light & Power Co. v. United States*, 256 U.S. 113, 123-124 (1921).

[6] *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 407-409 (1940).

ACFCD flood control channels are not "shallow portions near the edges" of the San Francisco Bay; they are man-made channels designed to convey freshwater storm surges from inland populated areas to the Bay for discharge.

In the end, the issue here is *not* whether the waters in the ACFCD flood control channels are jurisdictional under the CWA. For the purposes of this argument, Baccarat assumes that they are. The question is whether these channels are navigable-in-fact so as to allow application of Justice Kennedy's exception to his "significant nexus" test. In that regard, they are not. To label the flood control channels as navigable-in-fact would not only contradict this Court's application of *The Daniel Ball* definition of "navigable-in-fact" waters, it would create an inequitable and arbitrary result in which similarly-situated wetlands would be treated differently under the law, depending on whether they were near a freshwater flood control channel or a tidally-influenced flood control channel. Assuming that both channels qualify as "tributaries" and are "non-navigable," then both, under Justice Kennedy's test, should require a case-by-case analysis of whether a significant nexus exists between the wetlands and the navigable-in-fact waters to which the flood control channels ultimately connect. Applying this standard from *Rapanos* to the facts of this case, a site-specific significant nexus analysis is required.

3. The petition demonstrates that the Ninth Circuit's opinion directly contradicts both the plurality's "continuous surface connection" and Justice Kennedy's "significant nexus" tests. Pet. at 13-21. Instead, the Ninth Circuit expressly rejected any tests based on either a hydrological connection or a "significant nexus." Pet. App. at 10a-13a. Thus, even if respondents' application of the *Marks* rule to the *Rapanos* decision is correct, Baccarat has established that neither test was applied by the Court of Appeals.

4. The Ninth Circuit's perfunctory reference to the Corps' purported adjacency "findings" (Pet. App. at 13a) was fully addressed in the petition (Pet. at 15-21), and will not be replicated here. Like the Ninth Circuit, respondents devote less than a page to this superficial analysis. Opp. at 16; Pet. App. at 13a.

CONCLUSION

For the reasons set forth in Baccarat's petition and this reply, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 06-619

In the

Supreme Court of the United States

BACCARAT FREMONT DEVELOPERS, LLC,

Petitioner,

v.

UNITED STATES ARMY CORPS OF ENGINEERS; and LT. COL. TIMOTHY S. O'ROURKE, DISTRICT ENGINEER, SAN FRANCISCO DISTRICT,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF THE PETITIONER FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is Petitioner, whose action challenging a United States Army Corps of Engineers wetlands jurisdictional determination was pending when this Court issued its decision in the consolidated cases *Rapanos v. United States* and *Carabell v. United States Army Corps of Engineers*, __ U.S. __, 126 S. Ct. 2208, 165 L. Ed. 2d 159 (June 19, 2006) (collectively, "*Rapanos*"), entitled to a redetermination, conducted in accordance with the principles announced in *Rapanos*, of the existence or absence of federal jurisdiction over Petitioner's wetlands?

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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

Under Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of the petition for certiorari filed by Baccarat Fremont Developers, LLC (Baccarat). Written consent was granted by counsel for all parties and lodged with the clerk of this Court.

PLF was founded over thirty years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF litigates matters affecting the public interest at all levels of state and federal courts and represents the views of thousands of supporters nationwide. PLF advocates limited government, individual rights, and free enterprise. PLF has litigated numerous cases addressing the need for a balanced approach to environmental regulation, and PLF attorneys were counsel of record in *Rapanos v. United States*, 126 S. Ct. 2208 (2006), decided by this Court last Term.

PLF's analysis of the new jurisdictional test under *Rapanos* will provide a valuable and necessary viewpoint to assist the Court in determining whether to grant the petition.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case concerns the statutory scope of the Clean Water Act and, specifically, whether wetlands considered "adjacent" to waters of the United States prior to this Court's decision in *Rapanos* also necessarily qualify as adjacent wetlands in light of *Rapanos*. Shortly after this Court granted the petitions for certiorari in *Rapanos* and its consolidated counterpart, *Carabell v. United States*, the United States Court of Appeals for the

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[1] Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

Ninth Circuit issued the original panel decision in this case, determining that the United States Army Corps of Engineers (Corps) has jurisdiction under the Clean Water Act, 33 U.S.C. § 1251, *et seq.*, over Baccarat's property, App. A at 13a.

The circuit determined that Baccarat's wetlands are "adjacent" to waters of the United States within the meaning of 33 C.F.R. § 328.3(c) and this Court's decision in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985). App. A at 13a. The appellate court also held that the issue of "adjacency" jurisdiction under the Clean Water Act was not addressed in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers (SWANCC)*, 531 U.S. 159 (2001). App. A at 10a. The circuit never addressed the new jurisdictional standard in *Rapanos*, in which this Court invalidated the "adjacency" definition of 33 C.F.R. § 328.3(c) and limited *Riverside Bayview* to its facts. Instead, the standard the Ninth Circuit actually applied would find jurisdiction regardless of the quantity or quality of the surface flow connection between Baccarat's property and the waters of the United States. Notwithstanding this obvious tension between the original panel decision and *Rapanos*, Baccarat's petition for rehearing and rehearing en banc was summarily denied more than a month after *Rapanos* was decided. App. H at 51a-52a.

The Ninth Circuit's tacit assumption that pre-*Rapanos* adjacency necessarily satisfies the jurisdictional requirements announced in *Rapanos* cannot withstand scrutiny. Pre-*Rapanos* adjacency jurisdiction was predicated upon this Court's decision in *Riverside Bayview*, yet that case's upholding of the Corps' adjacency jurisdiction was based upon the premise that adjacent wetlands are, for all practical purposes, indistinguishable from their abutting navigable waterway. *See Riverside Bayview*, 474 U.S. at 134. In contrast, Baccarat's property is clearly separated from waters of the United States by a man-made berm. App. A at 2a-3a; App. B at 16a.

Regardless of the nature and extent of the Corps' "findings" of an alleged *SWANCC*-style significant nexus between Baccarat's property and waters of the United States, *see* App. A at 13a, the appellate court still erred in failing to re-analyze the case in light of *Rapanos*. Prior to *Rapanos*, the Corps' position, and that of several courts of appeals, was that a significant nexus is established through the existence of a hydrological connection or, alternatively, through adjacency. This Court expressly rejected that standard in *Rapanos* and *Carabell*. In those consolidated cases, the plurality opinion authored by Justice Scalia states that a hydrological connection is a necessary but not sufficient condition to Clean Water Act jurisdiction. *See Rapanos*, 126 S. Ct. at 2226-27 (plurality opinion). The concurring opinion authored by Justice Kennedy states that the touchstone for Clean Water Act jurisdiction, whether by hydrological connection or adjacency, is the existence of a significant nexus, which is demonstrated by wetlands' significant effect on the chemical, physical, or biological integrity of the waters of the United States. *See id.* at 2248. Prior to *Rapanos*, there was no such requirement for establishing a significant nexus. Nor is there any indication, either from the Ninth Circuit's original panel decision or its summary rehearing petition denial, that it viewed the Corps' findings as establishing jurisdiction under either *Rapanos* test. Consequently, Amicus urges the Court to grant the petition for writ of certiorari to vacate the decision below and remand the matter to the Ninth Circuit to allow it to apply the proper jurisdictional standard.

ARGUMENT

I

VACATURE AND REMAND ARE NECESSARY TO ALLOW THE LOWER COURT TO APPLY THE CORRECT STANDARD FOR CLEAN WATER ACT JURISDICTION

The Ninth Circuit decided Baccarat's appeal prior to the issuance of *Rapanos*. The appellate court's summary denial of Baccarat's petition for rehearing and rehearing en banc, issued after *Rapanos*, did not even cite to that precedent. The Ninth Circuit's failure to apply the current and binding precedent of this Court to Baccarat's appeal constitutes such a gross departure from normal appellate practice to justify this Court's intervention, vacature, and remand of the decision below.

The Ninth Circuit determined in its original panel decision that Clean Water Act jurisdiction extends to Baccarat's property because the latter is "adjacent" to waters of the United States. The opinion reasoned that this Court in *Riverside Bayview* upheld the Corps' wetlands adjacency jurisdiction as set forth in 33 C.F.R. § 328.3(c), and that *SWANCC* did not disturb that result. *See* App. A at 13a. But this conclusion cannot stand, for under any reading of *Rapanos*, the adjacency criterion has been dispensed with, replaced with a new jurisdictional test that operates on different variables and produces jurisdictional results not necessarily coextensive with those produced by the pre-*Rapanos* adjacency standard.

In *Riverside Bayview*, this Court was presented with the question of whether wetlands that are inseparably bound up with a navigable waterway (traditionally understood) can be regulated under the Clean Water Act. It held that the Corps' interpretation of the Clean Water Act, which would allow such jurisdiction, is reasonable. *See Riverside Bayview*, 474 U.S. at

134. The Court's conclusion was informed by scientific and practical concerns; it recognized that the identification of where water ends and land begins is not easy. In between those two extremes lie "shallows, marshes, mudflats [and] bogs." *Id.* at 132. But where a wetland is not inseparably bound up with a navigable waterway—*i.e.*, where one can clearly distinguish the terminus of the water from the emergence of land—adjacency jurisdiction is not present.

Here, Baccarat's wetlands are clearly distinguishable from the flood control channels that are conceded to be "waters of the United States." Baccarat's property is separated from those channels by man-made berms. App. A at 2a-3a, App. B at 16a. The channels are never closer than 65 to 70 feet from Baccarat's property. App. A at 3a. No one therefore can reasonably conclude that Baccarat's property is indistinguishable from the flood control channels. The regulation of Baccarat's property does not present the difficult question of "[w]here on this continuum [of water and land] to find the limit of 'waters,'" *see Riverside Bayview*, 474 U.S. at 132, an issue that informed the *Rapanos* majority's rejection of a theory of Clean Water Act jurisdiction that would operate independently of the quantity or quality of the relevant surface water connection, *see Rapanos*, 126 S. Ct. at 2227 (plurality opinion); *id.* at 2248 (Kennedy, J., concurring in the judgment).

Thus, the Ninth Circuit's use of the pre-*Rapanos* adjacency criterion is wrong because that standard does not coincide with the new jurisdictional tests announced in *Rapanos*. Under the jurisdictional tests set forth in Justice Scalia's plurality opinion and Justice Kennedy's concurring opinion, adjacency, although at times peripherally important to the jurisdictional inquiry, is no longer the linchpin of the analysis. Rather, both the plurality opinion and Justice Kennedy's concurrence operate on terms distinct from pre-*Rapanos* adjacency.

According to the plurality opinion, Clean Water Act jurisdiction obtains over wetlands if and only if the wetlands have a continuous surface water connection with the jurisdictional body of water such that it cannot be determined where the water ends and the wetlands begin. *Rapanos*, 126 S. Ct. at 2227 (plurality opinion). Although one might overlay adjacency terminology onto this rubric, the fact of adjacency, *i.e.* geographic proximity, is insufficient to establish jurisdiction. And because no continuous surface water connection exists between Baccarat's property and any water of the United States, Clean Water Act jurisdiction, according to the *Rapanos* plurality opinion, is not present.

A similar result obtains under the test set forth in Justice Kennedy's concurring opinion. For Justice Kennedy, the Corps has jurisdiction to regulate wetlands "if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Id.* at 2248 (Kennedy, J., concurring in the judgment). While a hydrological connection is not necessary to establish jurisdiction, its presence does not guarantee jurisdiction. *See id.* at 2251-52. With one exception not relevant here,[2] mere adjacency cannot establish wetlands jurisdiction. *See id.* Rather, the Corps must demonstrate that a significant nexus connects the wetlands to a traditional navigable waterway. The Corps' findings to that effect, discussed by the Ninth Circuit, do not establish that nexus.

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[2] Justice Kennedy suggested in his concurring opinion that wetlands adjacent to navigable-in-fact waters may be presumed to bear the requisite significant nexus. *See Rapanos*, 126 S. Ct. at 2248 (Kennedy, J., concurring in the judgment). But as Baccarat notes in its petition, no court has found that the flood control channels near Baccarat's property are navigable-in-fact. Petition at 12-13 n.4.

The Corps' first finding, that the wetlands are in reasonable proximity to the flood control channels, does not establish a significant nexus. As Justice Kennedy explained in his concurring opinion, "mere adjacency to a tributary of this sort [*i.e.*, nonnavigable] is insufficient; a similar ditch could just as well be located many miles from any navigable-in-fact water and carry only insubstantial flow towards it." *Id.* at 2252. The second finding, that the wetlands serve important environmental functions to nearby tidal waters, does not establish a significant nexus. At most the finding supports the scientifically obvious: wetlands are important to the aquatic environment. But if that were the operative criterion, then all wetlands in the Nation would arguably be subject to Clean Water Act jurisdiction. Justice Kennedy expressly rejected that proposition. Although environmental concerns were important in Justice Kennedy's estimation, *see* 126 S. Ct. at 2246-47, those concerns shape the significant nexus test, rather than constitute an independent basis of jurisdiction. *See id.* at 2248-49.

The Corps' third finding, that Baccarat's wetlands are important given the loss of wetlands in the San Francisco Bay area, does not, properly speaking, have anything to do with a substantial nexus. The degree of connection between Baccarat's property and the flood control channels is not what supposedly makes the property important according to this finding; it is rather the fact that the *quantity* of wetlands has been reduced. But Justice Kennedy's significant nexus test is a qualitative not quantitative inquiry. The Corps' fourth finding, that Baccarat's property is within the 100-year flood plain, does not of its own establish a significant nexus. *See Rapanos*, 126 S. Ct. at 2251 (concluding that mere assertion of possible flooding suggests an "undue degree of speculation" insufficient to establish jurisdiction).

Lastly, the Corps' fifth finding, that Baccarat's property is part of a single hydric soil unit also containing tidal waters, does not establish a significant nexus. The Corps argues in

essence that a groundwater connection is sufficient to establish a significant nexus. But regulation of groundwater as part of the "waters of the United States" is inconsistent with both the plurality's and Justice Kennedy's tests, which focus on surface water connection (or the lack thereof) to establish federal jurisdiction. *See id.* at 2225-26 (plurality opinion). *See also id.* at 2242 (Kennedy, J., concurring in the judgment) (criticizing plurality test for potentially upholding jurisdiction over the "merest trickle"). Even under Justice Kennedy's test, where jurisdiction may be present in the absence of a hydrological connection, that absence is relevant within the context of a surface water connection. *See id.* at 2251 ("Given the role wetlands play in pollutant filtering, flood control, and runoff storage, it may well be the absence of hydrologic connection (in the sense of interchange of waters) that shows the wetlands' significance for the aquatic system."). Thus, to hinge the jurisdictional inquiry on hydric soils would expand rather than contract pre-*Rapanos* Clean Water Act jurisdiction, and would be inconsistent with the narrowing intent of the *Rapanos* majority.

The Ninth Circuit's reliance on "adjacency" jurisdiction to uphold the Corps' assertion of regulatory authority over Baccarat's property simply fails to account for this Court's recent decision in *Rapanos*. Pre-*Rapanos* adjacency is not a reliable indicator of jurisdiction after *Rapanos*, for neither Justice Scalia's plurality opinion nor Justice Kennedy's concurring opinion turns upon geographic proximity. Therefore, this Court should grant Baccarat's petition for writ of certiorari, vacate the judgment of the Ninth Circuit, and remand the case for further proceedings consistent with *Rapanos*.

II

BECAUSE THE SCALIA PLURALITY OPINION IS CONTROLLING IN *RAPANOS*, CLEAN WATER ACT JURISDICTION CANNOT BE ESTABLISHED IN THE ABSENCE OF A CONTINUOUS SURFACE WATER CONNECTION

As described above, under the *Rapanos* plurality test, a wetland can be "adjacent" to a jurisdictional body of water, and thus itself subject to jurisdiction, if and only if the wetland has a continuous surface water connection with the jurisdictional body of water such that one cannot tell where the water ends and the wetland begins. *Rapanos*, 126 S. Ct. at 2227 (plurality opinion). In contrast, under the test announced in Justice Kennedy's concurring opinion, a wetland is jurisdictional "if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Id.* at 2248 (Kennedy, J., concurring in the judgment).

Although the *Rapanos* majority did not agree upon a single legal standard for determining Clean Water Act jurisdiction, the rule announced by the Court in *Marks v. United States*, 430 U.S. 188 (1977), for determining the holding of the Court when no opinion garners a majority of justices' votes suggests that the *Rapanos* plurality opinion is controlling. Under the *Marks* rule,

> [w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members

> who concurred in the judgments on the narrowest grounds . . . .

Id. at 193 (quotation marks omitted).

Among the *Rapanos* majority opinions, the plurality opinion constitutes the "narrowest grounds" because its rationale is a logical subset of Justice Kennedy's concurrence. *See United States v. Williams*, 435 F.3d 1148, 1157 n.9 (9th Cir. 2006). The *Marks* rule is founded upon the principle that an opinion which is a logical subset of another opinion concurring in the same judgment would necessarily gather the votes of all Justices joining in the Court's disposition. Put another way:

> The Justices supporting the broader legal rule must necessarily recognize the validity of the narrower legal rule. That is, if a statute is found to be constitutionally permissible pursuant to a strict scrutiny standard of review, then it is necessarily permissible pursuant to a rationale basis standard of review. From the text of the alternative concurring opinions, it is possible to determine that if all of the Justices apply the narrower rule, the outcome would have been the same.

Ken Kimura, *A Legitimacy Model for the Interpretation of Plurality Decisions*, 77 Cornell L. Rev. 1593, 1603-04 (1992).

In *Rapanos*, the plurality test is comparable to the narrower strict scrutiny standard whereas Justice Kennedy's test is comparable to the broader rational basis standard.

According to the plurality in *Rapanos*:

> Wetlands are "waters of the United States" if they [are] . . . as a practical matter *indistinguishable* from waters of the United States. . . . [Whereas] Justice KENNEDY's test is that they, "either alone or in combination with similarly situated lands in the

> region, significantly *affect* . . . other covered waters more readily understood as 'navigable.'" But what possible linguistic usage would accept that whatever (alone or in combination) *affects* waters of the United States *is* waters of the United States?

Rapanos, 126 S. Ct. at 2234 (plurality opinion).

Justice Kennedy's test is arguably broad enough that the plurality found that in practice the test would closely track the government's "any hydrological connection" test which the *Rapanos* majority struck down. *See Rapanos*, 126 S. Ct. at 2235 n.15 (plurality opinion). Clearly, a wetland that satisfies the plurality's test for federal jurisdiction will also satisfy Justice Kennedy's test. Even the *Rapanos* dissent acknowledged this undeniable fact:

> I assume that Justice KENNEDY's approach will be controlling in most cases because it treats more of the Nation's waters as within the Corps' jurisdiction, *but in the unlikely event that the plurality test is met but Justice KENNEDY's is not*, courts should also uphold the Corps' jurisdiction. In sum, in these and future cases the United States may elect to prove jurisdiction under either test.

Rapanos, 126 S. Ct. at 2265 n.14 (Stevens, J., dissenting) (emphasis added).

As Justice Stevens observed, it would be an "unlikely event that the plurality test is met but Justice Kennedy's is not." In other words, the plurality opinion was decided on the "narrowest grounds" because it is less sweeping and would require the same outcome in a subset of the cases that the more sweeping test of Justice Kennedy would. In point of fact, a wetland that meets the plurality's test for federal jurisdiction would not only satisfy the four Justices in the plurality as well

as Justice Kennedy, but it would also satisfy the four Justices in the dissent, for a unanimous vote of this Court.

Thus, because the *Rapanos* plurality opinion controls, and because no continuous surface flow exists between Baccarat's property and other jurisdictional waters (a requirement of the plurality opinion), *see* App. A at 3a, Clean Water Act jurisdiction does not extend to Baccarat's property.

CONCLUSION

For the foregoing reasons, this Court should grant Baccarat's petition for writ of certiorari.

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Respectfully submitted,

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